Supreme Court of the United States.

WILLIAM K. VANDERBILT ET AL., as Executors, etc.,
Plaintiffs in Error,

AGAINST

FERDINAND EIDMAN, as United States Collector of Internal Revenue,
Defendant in Error.

No. 206.

Brief For Plaintiffs in Error.

STATEMENT OF FACTS.

This action comes into this Court upon certain questions of law certified by the Circuit Court of Appeals for the Second Circuit, concerning which the instructions of this Court are desired for the proper determination of the cause.

The facts out of which the questions arose are as follows:

Cornelius Vanderbilt died in the City of New York on September 12th, 1899, leaving a will which was thereupon duly admitted to probate and of which the plaintiffs herein are the duly appointed and acting executors and trustees. The seventeenth clause of the will is as follows:

> "SEVENTEENTH: All the rest, residue and remainder of all the property and estate, real, personal and mixed, of every description, and wheresoever situated, of which I may die seized or possessed, or to which I may be entitled at the

time of my decease, including all lapsed legacies and the principal of any annuities which may terminate and any part of my estate which may not have been effectually devised or bequeathed or from any other source, I give, devise and bequeath to my executors, hereinafter named, and the survivors and survivor of them, in trust, to hold said estate and invest and reinvest the same and to collect the rents, issues, income and profits therefrom for the use of my son Alfred G., and to apply so much of said net income as may be in their judgment advisable, to his support, maintenance and education, and for the care and maintenance of his property during his minority, and to accumulate any surplus income, such accumulations to be paid to him when he arrives at the age of twenty-one years and thereafter to pay the net income of said estate to him as received until he arrives at the age of thirty years, when he shall be put in full possession of one-half of the portion of said estate to be set apart for that purpose by my executors and the survivors of them. And upon further trust thereafter to pay to my said son, Alfred G., the income from the balance remaining of said estate until he shall arrive at the age of thirty-five years, when he shall be put in possession of the balance of said trust estate, and the said trustees shall be discharged from any and all liability and responsibility in respect thereof. If my son Alfred G. should die before attaining the age of thirty-five years, leaving issue, such portion of the estate as shall not then have come into his possession shall be divided by my executors into as many equal shares as he may leave children him surviving, and one share shall be held by my executors to the use of each such child or children until he or she shall attain the age of twenty-one years, when it shall be paid to such child; but if he shall die without child or children, or if none of his children shall attain major-

ity, then it is my will that my son Reginald C. shall in all respects, as to said residuary estate, stand in the place and stead of his brother Alfred G., and that if Alfred G. shall die without issue before he attains the age of thirty years, then Reginald C. shall receive the income from said estate until he attains the age of thirty years, when he shall be put in possession of one-half of the residuary estate, and thereafter Reginald C. shall receive the net income of the remaining one-half of my estate, and on arriving at the age of thirty-five years he shall be put in possession of the whole of said estate, and my said executors shall hold said estate upon such trust, and I give and devise the same accordingly. If Alfred G. and Reginald C. shall both die before being put into possession of said estate, and without issue, I give whatever then remains of my residuary estate to my daughters Gertrude and Gladys Moore, share and share alike ; and if either of my said daughters be then dead leaving issue, her issue to take his or her mother's share, *per stirpes* and not *per capita ;* and in default of issue, the survivor shall take the principal."

This clause contains the only provisions in the will relating to or in any manner affecting the disposition of the residuary estate of the testator and determining the extent and character of the interests therein.

All of the children of said Cornelius Vanderbilt named in the said seventeenth clause of his Will survived him and were living at the time this suit was brought. At the time of the death of the said Cornelius Vanderbilt his son Alfred G. Vanderbilt was between twenty-two and twenty-three years of age, and his son Reginald C. Vanderbilt was between nineteen and twenty years of age, and both were unmarried.

The appraised value of the residuary personal estate at the time of the testator's death was $18,-972,117.46.

The appraised value of Alfred G. Vanderbilt's interest in the income of the residue until he becomes thirty years of age was $5,119,612.43. With respect to this interest the executors of Cornelius Vanderbilt paid an internal revenue tax under sections 29 and 30 of the "War Revenue Act" of June 13, 1898, at the rate of 2½ per cent. thereon, amounting to $115,191.28.

The Commissioner of Internal Revenue thereafter, under the alleged authority of Sections 29 and 30 of said "War Revenue Act," assessed with respect to Alfred G. Vanderbilt's interest in the residue an internal revenue tax at the rate of 2½ per cent. on the full appraised value of the residue, amounting, as aforesaid, to $18,972,117.46, which tax amounted to..$426,872.64

Against this was credited the tax already paid on the interest above referred to, such interest being included in the entire value of the residue, which tax amounted to..... 115,191.28

Leaving an unpaid balance of the tax assessed, as aforesaid, amounting to $311,681.36

In making this assessment the Commissioner of Internal Revenue claimed and assumed that, because, according to the average of chances shown by the mortality tables at the time of the death of Cornelius Vanderbilt, Alfred G. Vanderbilt had an expectancy of life beyond the period when, if he lives so long, he will become absolutely entitled to the entire principal of the residuary estate, he was to be considered for the purposes of assessing the taxes imposed by Sections 29 and 30 of the said Act of Congress of June 13, 1898, as then having a present vested interest in the entire principal of the residue.

The unpaid balance of this assessment was paid by the executors under protest and upon compulsion of the collector's threat of distraint and sale, on the 3d day of September, 1901. The executors thereupon made the statutory application to the Commissioner of

Internal Revenue for its refund, which was refused, and they then commenced this action to recover the amount so paid.

The defendant demurred to the complaint on the general ground that it did not state facts sufficient to constitute a cause of action. The Circuit Court sustained the demurrer and directed judgment dismissing the complaint, and for costs and disbursements of the action, which judgment was entered. The plaintiffs then took the case to the United States Circuit Court of Appeals for the Second Circuit, which has certified to this Court the following questions:

I. Is the tax imposed by sections 29 and 30 of the act of Congress of June 13, 1898, entitled "An act to provide ways and means to meet war expenditures and for other purposes," with respect to Alfred G. Vanderbilt's interest under the seventeenth clause of the will of Cornelius Vanderbilt, a tax upon the transmission to and receipt by the trustees of the property passing to them as trustees under the legacy out of which such interest arises?

II. If the preceding question is answered in the negative, is the tax imposed under said act with respect to Alfred G. Vanderbilt's interest under said seventeenth clause a tax upon the transmission to and receipt by said Alfred G. Vanderbilt of his beneficial interest in the property passing under such legacy?

III. Did sections 29 and 30 of said act authorize the assessment and collection of a tax with respect to any of the rights or interests of Alfred G. Vanderbilt as a residuary legatee of the personal estate of Cornelius Vanderbilt under the seventeenth clause of the will, with the exception of his present right to receive the income of such estate until he attains the age of thirty years, prior to the time when, if ever, such rights or interests

shall become absolutely vested in possession or enjoyment?

IV. If the tax under sections 29 and 30 of said act was presently assessable and collectible upon all the interests of Alfred G. Vanderbilt in said legacy, was the clear value of all such interests, for the purposes of computing the tax, equal to the full value of the property comprised in the legacy out of which such interests arose?

THE POINT AT ISSUE IN THE COURT BELOW WAS THE LEGALITY OF THE ASSESSMENT AND COLLECTION OF THE TAX IN THIS CASE AT THE TIME AND IN THE AMOUNT SET OUT.

It was contended by the plaintiffs in error:

FIRST: That the tax was occasioned not by the passing of the property to the trustees, but by the passing of the beneficial interest therein to the beneficiary, and was imposed not upon the property passing, but upon the beneficial interest, the clear value of which is the basis upon which the tax is computed.

SECOND: That the true intent and meaning of the act was to tax only perfected interests which had a clear value, and therefore that Alfred G. Vanderbilt's present right to receive the income of the residue until he attains the age of thirty years is the only presently taxable interest passing to him under the seventeenth clause of the Will; that his other interests arising under that clause, namely, his right to receive one-half of the residuary estate if and when he becomes thirty and his right to receive the income of the remaining half until he becomes thirty-five, and to receive the balance of the principal if and when he reaches that age, being conditional interests dependent upon the uncertainty of his living to attain the particular age required, have no clear value within the meaning of the act upon which a tax could be computed, and that consequently they are not subject to taxation until all uncertainty is removed and they actually come

into possession or enjoyment, if the beneficiary shall live so long.

THIRD: That even assuming the interests of Alfred G. Vanderbilt in the residue of his father's estate, other than his present right to the income therefrom until he becomes thirty years of age, to be subject to a present assessment, the assessment in controversy in this case was excessive, inasmuch as the present clear value of his interests in the residue, the enjoyment of which is in part postponed and conditioned upon the uncertainty of his reaching the age of thirty years as to one-half of the residue, and thirty-five years as to the other half, is not presently equal to the full cash value of the property comprising the entire residue, upon which valuation the tax on his interests therein was computed by the Collector.

FOURTH: That even if it be assumed for argument that the tax was not excessive, the act did not require or authorize its collection prior to the time when Alfred G. Vanderbilt shall come into the actual possession and enjoyment of the property passing under the legacy, inasmuch as the law, as construed by this Court, required that the tax with respect to each legacy be paid out of such legacy and not out of the bulk of the estate, thereby making its collection prior to the actual vesting of such legacy either in possession or enjoyment premature and at the expenses of some other interest.

THE GROUNDS UPON WHICH THE COURT BELOW SUSTAINED THE TAX.

In the opinion of Judge WHEELER of the Circuit Court in deciding this case below, these contentions were disposed of as follows:

> "The principal ground for claiming back the money seems to be that these are several contingent legacies for the respective beneficiaries which could only be taxed at their actual value when and as they should become absolutely vested.

This is, however, one bequest, and one only, of this residue to the executors in trust, primarily for the benefit of the son Alfred G., although by the happening of events it may reach others of the relatives of the testator. If it should they are all included in the same class with this son, in the clause quoted of Section 29 of the Act under which the tax was assessed, and the rate would be the same.

"The capacities of the executors as such and as trustees for the beneficiaries, although vested in the same persons, were as separate and distinct for the purpose of taking and passing the property as executors, and holding it as trustees for the beneficiaries, as if they had been respectively several persons. (Carey vs. Roosevelt, 102 Fed. Rep., 569). It would pass absolutely from the executors in their capacity as such to the executors as trustees for the beneficiaries, and no part of it would ever go back to the executors as such or to the estate. The Act charges 'legacies or distributive shares' 'passing' 'from any person possessed of such property,' 'by will', 'to any person or persons,' 'in trust or otherwise.'

"This property passed from the testator, by this clause of this will, through the plaintiffs, as executors, to themselves as trustees, to hold, 'in trust', for the beneficiaries. In so passing from the testator by will to the persons who became executors as trustees after the death of the testator as grantor, it precisely fulfilled the words of the statute laying the tax. The assessment is not laid upon the beneficiaries personally, but upon the property; and not upon that as it reaches them, but in cases like this as it goes to the trustees for them."

Vanderbilt vs. Eidman, 121 Fed. Rep., 590.

As an authority for this conclusion he cited *Knowlton vs. Moore*, 178 U. S., 41, but no quotation from

that case is referred to in support of such conclusion and it will appear from the full examination of that case made below that it actually is an authority against the conclusion stated by the Court below.

It is respectfully submitted that the Court below was wrong, both in construing and applying the Act.

For convenience in presenting the argument, the exact meaning of the Act will first be considered, so far as it applies to the questions here, and then such meaning will be applied to the situation arising on the facts in the present case.

POINT I.

Sections 29 and 30 of the Act of June 13, 1898, imposed a legacy tax as distinguished from a probate tax; that is, they provided for the imposition of a tax upon the right to take a beneficial interest in the property of a decedent, arising in the manner prescribed in the Act, which tax was directed to be assessed at a certain rate per cent. of the clear value of such beneficial interest, the rate being primarily determined by the relationship of the beneficiary to the testator. Where property is limited in trust they did not provide for the imposition of a tax upon the passing to the trustees of the bare legal title to the property regardless of the character of the beneficial interest or interests therein.

The Act of June 13th, 1898, as it stood at the time of the testator's death and of the assessment of the

tax in controversy, so far as it relates to taxes with respect to legacies and distributive shares of personal property is as follows:

> "SEC. 29. That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this Act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows —that is to say: Where the whole amount of said personal property shall exceed in value ten thousand and shall not exceed in value the sum of twenty-five thousand dollars the tax shall be:
>
> FIRST. Where the person or persons entitled to *any beneficial interest* in such property shall be the lineal issue or lineal ancestor, brother, or sister to the person who died possessed of such property, as aforesaid, at the rate of seventy-five cents for each and every hundred dollars *of the clear value of such interest* in such property."

The second, third, fourth and fifth subdivisons provide for an increasing rate in proportion to the remoteness of the relationship and the larger value of the interest taxed, the fifth subdivision providing also that all legacies or distributive shares passing to a husband or wife should be exempt from any tax or duty.

"SEC. 30. That the tax or duty aforesaid shall be a lien and charge upon the property of every person who may die as aforesaid for twenty years, or until the same shall, within that period, be fully paid to and discharged by the United States; and every executor, administrator, or trustee, *before payment and distribution to the legatees, or any parties entitled to beneficial interest therein*, shall pay to the collector or deputy collector of the district of which the deceased person was a resident the amount of the duty or tax assessed upon such legacy or distributive share, and shall also make and render to the said collector or deputy collector a schedule, list, or statement, in duplicate, of the amount of such legacy or distributive share, together with the amount of duty which has accrued, or shall accrue, thereon, verified by his oath or affirmation, to be administered and certified thereon by some magistrate or officer having lawful power to administer such oaths, in such form and manner as may be prescribed by the Commissioner of Internal Revenue, which schedule, list, or statement shall contain the names of each and every person *entitled to any beneficial interest therein*, together with the clear value of such interest * * *" (30 Stat., 464).

This Act has already been analyzed and construed by this Court in the case of *Knowlton vs. Moore*, 178 U. S., 41, and a review of the decision in that case will be of value in showing the exact meaning of the Act in its bearing on the questions in this case.

In *Knowlton vs. Moore (supra)* the constitutionality of the War Revenue Act was attacked on several grounds and the questions which arose for review before this Court, as stated in its opinion (p. 45), were as follows:

"First, that the taxes should be refunded because they were direct taxes, and not being appor-

tioned were hence repugnant to article 1, section 8, of the Constitution of the United States; second, if the taxes were not direct, they were levied on rights created solely by state law, depending for their continued existence on the consent of the several States, a volition which Congress has no power to control, and as to which it could not, therefore, exercise its taxing authority; third, if the taxes were not direct, and were not assessed upon objects or rights which were beyond the reach of Congress, nevertheless the taxes were void, because they were not uniform throughout the United States, as required by article 1, section 9, of the Constitution of the United States; fourth, because, although the taxes be held to have been in all respects constitutional, nevertheless they were illegal, since in their assessment the rate of the tax was determined by the aggregate amount of the personal estate of the deceased, and not by the sum of the legacies or distributive shares, or the right to take the same, which were the objects upon which by law the taxes were placed."

Mr. Justice WHITE, in delivering the opinion of the Court (as stated by him at page 46), first considered in a general way upon what rights or objects death duties are imposed, and then, having reviewed the history of such taxes and reached a conclusion on that subject, proceeded to consider the extent of the power of Congress to levy such taxes and, finally, the particular Act under review was analyzed for the purpose of ascertaining the precise form of tax for which it provides and the mode of assessment which it directs.

I. *The rights and objects upon which death duties are imposed.*

On this point the opinion reviews, beginning at page 50, the Congressional regulations on the subject showing that a legacy tax was first imposed by Congress in

1797 under which act "the mode of collection provided for was by stamp duties laid on receipts evidencing the payment of the legacies or distributive shares in personal property, and the amount was, like the English legacy tax, charged upon the legacies and not upon the residue of the personal estate."

It is then shown that a legacy tax law was again enacted under the act of July 1, 1862, which tax, as in the act of 1797, was imposed on legacies or distributive shares of personal property, but there was also imposed in the same act a probate duty chargeable against the mass of the estate and later, in 1864, a succession tax chargeable upon interests in real estate as follows:

> (p. 51). "By Section 194 a probate duty, proportioned to the amount of the estate and to be paid by way of stamps, was levied. The result of the act of 1862, therefore, was to cause the death duties imposed by Congress to greatly resemble those then existing in England; that is, first, a legacy tax, chargeable against each legacy or distributive share, and a probate duty chargeable against the mass of the estate. The only difference between the system created by the act of 1862 and that existing in England was that the act of 1862 did not embody the succession tax provided for in England, by which interests in real estate passing by death were subjected to a duty. * * * The act of 1864, however, added, in separate sections, a duty on the passing of real estate, in substantial harmony with the principle of the succession tax expressed in the English Succession Duty Act. Thus it came to pass that the system of death duties prevailing in England and that adopted by Congress—leaving out of view the differences in rates and the administrative provisions—were substantially identical, and of a three-fold nature, that is, a *probate duty* charged upon the whole estate, a *legacy duty* charged upon each legacy or distributive share of personalty,

and a *succession duty* charged against each interest in real property."

The conclusion drawn from this historical review as to the character of such taxes is stated in the opinion as follows:

(p. 55): "Thus, looking over the whole field, and considering death duties in the order in which we have reviewed them, that is, in the Roman and ancient law, in that of modern France, Germany and other continental countries, in England and those of her colonies where such laws have been enacted, in the legislation of the United States and the several states of the Union, the following appears:

"Although different modes of assessing such duties prevail, and although they have different accidental names, such as probate duties, stamp duties, taxes on the transaction, or the act of passing of an estate or a succession, legacy taxes, estate taxes or privilege taxes, nevertheless tax laws of this nature in all countries rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested."

II. *The Power of Congress to levy such taxes.*

On the question of what power Congress had under the Constitution to levy such taxes the conclusion of the Court was that although Congress has no right to impose the taxes imposed by States as a condition for the privilege of transmitting or receiving property by will, yet it has full power under the Constitution to impose a tax upon the right or license to transmit or receive property when such right has been established under the laws of the States, to

the same extent that it has to impose any other form of taxation.

This question was the vital question in that case, and the language of the opinion leaves no room for doubt as to the meaning of the decision. The following extracts will sufficiently show the conclusion of the Court on this feature of the argument:

(p. 58:) "All courts and all governments, however, as we have already shown, conceive that the transmission of property occasioned by death, although differing from the tax on property as such, is, nevertheless, a usual subject of taxation. Of course in considering the power of Congress to impose death duties, we eliminate all thought of a greater privilege to do so than exists as to any other form of taxation, as the right to regulate successions is vested in the States and not in Congress."

* * * * * *

(p. 58:) "The limitation which would exclude from Congress the right to tax inheritances and legacies is made to depend upon the contention that as the power to regulate successions is lodged solely in the several States, therefore Congress is without authority to tax the transmission or receipt of property by death."

* * * * * *

(p. 59:) "But the fallacy which underlies the proposition contended for is the assumption that the tax on the transmission or receipt of property occasioned by death is imposed on the exclusive power of the State to regulate the devolution of property upon death. The thing forming the universal subject of taxation upon which inheritance and legacy taxes rest is the transmission or receipt, and not the right existing to regulate. * * * Certainly, a tax placed upon an inheritance or legacy diminishes, to the extent of the tax, the value of the right to inherit or receive, but this is

a burden cast upon the recipient and not upon the power of the State to regulate."

III. *The form of the tax under this particular Act and its mode of assessment.*

As the statute imposes no tax whatever with respect to the devolution of real estate, this part of the discussion was narrowed down to the question, whether the tax imposed was a probate tax or a legacy tax: that is, whether it was a tax upon the passing of the entire personal estate of a decedent or a tax upon the separate right of succession with respect to each separate legacy or distributive share arising out of the personal estate.

The following extracts from the opinion cover this feature of the case so far as the questions now under consideration are involved:

(p. 61:) "We are then brought to a consideration of the particular form of death duty, which is manifested by the statute under consideration. * * * It is at the outset obvious that the exact meaning of the statute is not free from perplexity, as there are clauses in it, when looked at apart from their context, which may give rise to conflicting views."

The tax is imposed not upon the whole bulk of the estate, but with respect to each separate legacy.

(p. 65:) "On the very threshold, the theory that the tax is not on particular legacies or distributive shares passing upon a death, but is on the whole amount of the personal property of the deceased, is rebutted by the heading, which describes what is taxed, not as the estates of deceased persons, but as 'legacies and distributive shares of personal property.'"

* * * * * *

(p. 65:) "The opening words of Section 29 may, for clearness, be thus arranged:

'That any person or persons having in charge or trust, as administrators, executors or trustees, any legacies or distributive shares arising from personal property, * * * passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory, * * * shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows: that is to say,' &c.

"Thus collocated, the statute clearly imposes the duty on the particular legacies or distributive shares, and not on the whole personal estate. It does not say that the tax is levied on the personal estate left by the deceased person, *but it is imposed on legacies or distributive shares arising from such property.*"

* * * * * *

(p. 66:) "When the rate of tax is thus calculated upon the particular attitude to the deceased of each of the legatees or distributees, the sum of the tax must be deducted either from each particular legacy or from the mass of the whole personal estate. If it is deducted from each particular legacy, then it is manifest that the tax imposed will have been levied, not upon the mass of the estate, but upon each particular legatee or beneficiary, since the share of such person will have paid a rate of taxation predicated upon the amount of the legacy and the relationship, or want of relationship, of the particular recipient thereof to the deceased. This being the case, no room would be left for the contention that the tax was imposed on the whole estate."

* * * * * *

(p. 67:) "The provisions for the collection of the tax contained in Section 30 of the act confirm the construction that the passing of each legacy or distributive share, and not the entire personal estate of a deceased person, forms the subject of the

> tax. Thus, before payment and distribution to the legatees, &c., an executor, administrator or trustee is required to pay 'the amount of the duty or tax assessed upon such legacy or distributive share,' and to 'make and render a schedule,' &c., in duplicate, 'of the amount of such legacy or distributive share, together with the amount of duty which has accrued, or shall accrue thereon,' and the schedule is required to 'contain the names of each and every person entitled to any beneficial interest therein.'"

A comparison is then made between the taxes imposed under the acts of 1797, 1862 and 1864 with the tax imposed under the present act, from which it appears that the probate tax upon the whole estate and the succession tax upon the real estate appearing in the prior acts have been omitted from the present act which contains only a legacy tax imposed with respect to each separate legacy of personal property, independently of any other legacy or of the bulk of the estate, and that with respect to such legacy tax the present tax is identical in its theory and application with the legacy tax imposed under the act of 1864.

The conclusion of the Court on these points, stated in its own language, is as follows:

> (p. 71:) "The subject taxed, therefore, under the present act is the same which was taxed under the act of 1864. * * * Now, as the act of 1864 taxed, not the whole estate, but each particular legacy or distributive share, the conclusion cannot be escaped that the present law does the same thing, except that there is added thereto a progressive rate."

The tax is not upon the property passing.

From what has been previously said it is evident that the tax is not a tax upon the property passing.

The Court below was confused on this point, and in its opinion seems to have held that the tax is laid upon property. This in fact is stated in so many words in the opinion quoted above at page 8 :

> " The assessment is not laid upon the beneficiaries personally, but upon the property ; and not upon that as it reaches them, but in cases like this, as it goes to the trustees for them." (citing this case of *Knowlton vs. Moore*).

The learned Judge below was evidently under a misapprehension, however, in citing this case as an authority for that statement, inasmuch as it distinctly appears in the opinion of the this Court in *Knowlton vs. Moore* that this tax is held not to be a direct tax, but one to be classified among " impost duties and excises," and, therefore, not subject to the requirements of apportionment ; in other words, that it is not a tax directly upon the property itself passing under the will.

Quoting again from *Knowlton vs. Moore*, at page 78 :

> " The precise meaning of the law being thus determined, the question whether the tax which it imposes is direct, and hence subject to the requirement of apportionment, arises for consideration. That death duties, generally, have been from the beginning in all countries considered as different from taxes levied on property, real or personal, directly on account of the ownership and possession thereof, is demonstrated by the review which we have previously made. It has also been established by what we have heretofore said, that such taxes, almost from the beginning of our national life, have been treated as duties, and not as direct taxes."

To hold that the tax is a direct tax upon the property, is to hold that the Act is unconstitutional,

because not fulfilling the requirement of apportionment. That exact point was involved in the case of *Knowlton vs. Moore*, and the Supreme Court in sustaining the Act necessarily decided that the tax was not a direct tax.

In the recent case of *Snyder vs. Bettman*, 190 U. S., 249, the case of *Knowlton vs. Moore* is reviewed and not a shadow of doubt is left as to the meaning of the decision in that case on the question of the character of the legacy tax and the subject matter taxed.

The opinion of the Court in that case, at page 251, states the four grounds upon which the constitutionality of the Act was attacked in *Knowlton vs. Moore*, as follows:

> "(1) That the taxes imposed were direct taxes, and not apportioned according to the population; (2) if not direct, they were levied on rights created solely by a state law, depending for their continued existence on the consent of the several States; (3) because they were not uniform throughout the United States; (4) that the rate of tax was determined by the aggregate amount of the personal estate of the deceased, and not by the sum of the legacies or distributive shares."

The opinion then continues:

> "It was held, following the cases of *United States v. Perkins*, 163 U. S., 625, and *Magoun v. Illinois Trust & Savings Bank*, 170 U. S., 283, that an inheritance tax was not one upon property but upon the succession."

and again, at page 254:

> "as repeatedly held, the taxes imposed are not upon property, but upon the right to succeed to property."

The Chief Justice, Mr. Justice WHITE and Mr. Justice PECKHAM joined in a dissenting opinion, written by Mr. Justice WHITE, who wrote the prevailing opinion in *Knowlton vs. Moore*, but there is no disagreement as to the meaning of the decision of *Knowlton vs. Moore* on these points. Mr. Justice WHITE says at page 258:

> "It was held, after great deliberation, in *Knowlton v. Moore*, 178 U. S., 41, that the inheritance taxes levied by the act of Congress were not imposed on the estate of the decedent but were laid on the passing of the legacies, and on nothing else."

and again, on the same page:

> "It was not only directly held in *Knowlton v. Moore* that the tax was on the transmission or the receipt of the legacy occasioned by death, and was therefore not on the property, not on the estate, not on the executor, but it was also held to be a burden imposed on the recipient."

The question involved in the case of *Snyder vs. Bettman* was the assessment by the Federal Government of an inheritance tax with respect to a legacy to a municipal corporation for a public governmental purpose, and in supporting the right of the government to collect such a tax the majority of the Court held that although the tax was undoubtedly on the right to take, yet, inasmuch as by the terms of the Act it was payable out of the legacy and by the executors before delivery to the legatee, the tax fell only indirectly upon the legatee and therefore was not repugnant to the Constitutional prohibition against a tax by the United States upon the States or their agencies.

The dissent was on the question of the indirectness of the tax.

The tax is on the right to succeed to property, and it is the passing of such a beneficial interest and not the passing of the property itself that occasions the tax.

The learned Judge below having fallen into the error hereinabove pointed out that the tax was upon the property itself, naturally fell into the further error that the tax was perfected as the property passed to the trustees, and was computed upon the full value of the property at the time of such passing. In this view of the matter he failed to see the necessity of determining the value of the beneficiary's interest in the legacy, and treated as meaningless the provisions relating to the computation of the tax upon the clear value of such interests.

In order to avoid holding the Act unconstitutional because imposing a direct tax without apportionment, it was found necessary in *Knowlton vs. Moore* to interpret the tax as a tax not upon the property, but upon an interest generated by death. Under this interpretation the words of the statute laying the tax must be taken as applying it not to the property itself, but to the beneficial interest in the property passing to the legatee, upon the clear market value of which interest the Act provides that the tax is to be computed. It is true that the tax is made a lien by the Act upon the property passing. The subject of the tax, nevertheless, is the beneficial interest, and not the property itself, although doubtless this provision for the collection of the tax out of the property is partly accountable for the error of the Court below as to the subject matter of the tax.

In this connection it is desired to call the attention of the Court briefly to the method by which the conclusion of the Court below was arrived at.

Judge WHEELER in his opinion (page 8) puts together several widely separated and disconnected phrases of the act into a sentence as follows:

> "The act charges 'legacies or distributive shares,' 'passing,' 'from any person possessed of

> such property,' 'by will,' 'to any person or persons,' 'in trust or otherwise,' "

and on the sentence thus constructed he rests the whole weight of his decision. He says:

> "This property passed from the testator by this clause of his will through the plaintiffs as executors to themselves as trustees to hold in trust for the beneficiaries. In so passing from the testator, by will, to the persons who became executors as trustees, after the death of the testator as grantor; it precisely fulfilled the words of the statute laying the tax."

If this means that the passing of the legacy in trust to the trustees is the subject matter of the tax it is respectfully submitted that neither the language of the act nor the character of the tax will permit such a construction.

It is not claimed that no tax attaches with respect to legacies passing in trust, for the opening words of the section preclude any such contention; but it is claimed that the mere passing of the legacy to the trustees in trust does not occasion the tax. It is immaterial whether the legacy be in the hands of the executors or has passed to the trustees, for in both cases alike it is the passing of the beneficial interest in the legacy and not the passing of the legacy itself which occasions the tax. The fact that under Judge WHEELER's construction the tax would be imposed without regard to the beneficial interests in the legacy is in itself sufficient to show its inherent weakness, for no construction which disregards the provisions relating to the beneficial interests can possibly give the full meaning to the act as intended by Congress and interpreted by this Court.

As stated in the opinion in *Knowlton vs. Moore* (page 61):

> "The exact meaning of the statute is not free from perplexity, as there are clauses in it, when looked at apart from their context, which may give rise to conflicting views."

The clause containing the phrases extracted by Judge WHEELER apart from their context furnishes a case in point. But when these several provisions are looked at in their proper setting, and with due regard to the other provisions of the act, the words will be found to have quite a different application from that attached to them by Judge WHEELER.

The paragraph of Section 29 thus paraphrased by Judge WHEELER has already been given full consideration by this Court in *Knowlton vs. Moore (supra)*, where, at page 65 of the opinion, it is thus arranged:

> "That any person or persons having in charge or trust, as administrators, executors or trustees, any legacies or distributive shares arising from personal property, * * * passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory, * * * shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows: that is to say," &c.

So far as it relates to this case the paragraph may be still further shortened as follows:

> "Any person or persons having in charge or trust as administrators, executors or trustees, any legacies * * * shall be and hereby are made subject to a duty or tax," &c.

The wording of the Act shows that it cannot be read as Judge WHEELER would read it: Any property passing, &c., "shall be and hereby *are* subject to a duty or tax," &c. But even so, nothing would be gained, for

it would only serve to invalidate the Act as unconstitutional, in its present form.

The chief difficulty with the paragraph is that in terms it seems to charge the executors and trustees with the tax. It has been held by this Court, however, that this was not the intention of the Act.

The omitted portion in connection with which the words "in trust or otherwise" occur is as follows:

> "or personal property or interest therein transferred by deed, grant, bargain, sale or gift made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be," &c.

Referring back to Judge WHEELER'S construction of this paragraph, it would seem that he has taken the words "in trust or otherwise," which are omitted in the paragraph as arranged above, and read them into it as if they were connected with the provisions for the tax with respect to legacies. No sufficient reason appears why such a change should be made in the arrangement of the paragraph already adopted by this Court. The provisions which relate to legacies are found at the very beginning of the section, and the words "in trust or otherwise" occur, as above shown, toward the end of the paragraph, and are separated from the earlier part by the provisions dealing with a different class of property and a different method of transfer than legacies passing by will. The words "in trust or otherwise" follow these provisions and are used in connection with the clause relating to the passing of property to a "body or bodies, politic or corporate, in trust or otherwise." Their use in this connection is appropriate and important to carry out consistently the scheme of the Act, for up to that point the section has referred only to "a person or persons" as trustees, holding property, so that prop-

erty held by a "body politic or corporate" would not be similarly treated without the addition of the words "in trust or otherwise." On the other hand, however, the earlier provisions relating to legacies held by executors or trustees are complete as they stand without the addition of the words "in trust." It would therefore seem to be inappropriate to add the words "in trust" to the provisions with respect to legacies in the hands of the trustees; a trustee cannot hold a legacy otherwise than in trust. Such words, therefore, add nothing to the meaning of the provisions and are useless, while the words "or otherwise" associated in the phrase with the words "in trust" when thus applied are worse than useless, for when applied to a legacy held by a trustee they create an impossible situation.

It will be observed that under the construction adopted by Judge WHEELER, he seems to have held that the transfer of property from the executors to the trustees is a taxable transfer within the meaning of the Act. In other words, he would make the Act distinguish between legacies held by executors and legacies held by trustees. It should be noted, however, that the terms of the Act place them on exactly the same footing and there is apparently no reason why any distinction between them should be made.

The unsoundness of the construction put by Judge WHEELER upon the opening paragraph of the act is further evidenced by the other provisions of the act which must be read in connection with it.

It will be observed in Section 30 of the act, which embodies the administrative provisions, that the executors are required to pay the tax before payment and distribution of beneficial interests in the legacies to the legatees, and no requirement is imposed for the payment of the tax before transferring the property to trustees, as would be necessary under Judge WHEELER'S construction. Furthermore, by the provisions of this section the trustees of legacies in the same way as the executors are required to pay the

taxes before distribution of the beneficial interests, which provision would be entirely unnecessary on Judge WHEELER'S theory that the tax attaches as the property passes from the executors to the trustees.

A further and most serious objection is presented when the paragraph under consideration is read in connection with the provisions of subdivision 5 of the same section exempting from taxation a legacy to a a husband or wife. The language there is:

> "That all legacies or property passing by will or by the laws of any state or territory to husband or wife of the person dying possessed as aforesaid shall be exempt from tax or duty."

The practical application which has been given to this provision in the administration of the law and the construction which has been given to the act by this Court exempts alike from taxation property passing directly to a husband or wife and property passing to trustees in trust for them, and it is not to be presumed that Congress intended to make any distinction between these two cases. Under Judge WHEELER'S construction, however, imposing a tax upon property as it passes from the executors to the trustees regardless of the beneficial interest of the beneficiary, a legacy to a trustee in trust for a husband or wife would not be within this exception which in terms applies only to property passing "*to* the husband or wife."

But apart from the conflict with the other provisions of the act into which his construction would lead, a much more serious difficulty is found in reconciling it to the general theory of the tax which this Court has adopted. The inevitable conclusion of Judge WHEELER'S position as stated by himself is that the tax is laid upon the *property* "as it goes to the trustees" for the beneficiaries; but this conclusion, for reasons which have been fully discussed elsewhere, is not only in conflict with the decision of this Court

but would destroy the entire validity of the act as in contravention of the constitutional provisions with respect to direct taxation.

It is respectfully submitted that in seeking a simple and easy way to dispose of this case Judge WHEELER has done violence to the plain meaning of the act and raised more far-reaching difficulties than those which he sought to avoid.

Turning again to the opinion in *Knowlton vs. Moore*, the exact character of the interest against which the tax is assessed is found to be defined in unmistakable terms as the interest to which the legatee succeeds on the death of the testator, and not the interest which ceased by reason of such death. In that case after pointing out, as shown above, that the tax under this Act is not a probate tax on the estate as it passes from the testator, but a legacy tax, as defined in the opinion, on the interest of each legatee in each particular legacy (page 71), the exact distinction between these two different subjects of taxation is stated as follows:

> (p. 77). "Indeed, the confusion which gives rise to both of the constructions of the statute which we have just considered comes from the want of insight pointed out by Hanson in a passage which we have heretofore quoted; that is, it arises from not keeping in mind the distinction between a tax on the interest to which some person succeeds on a death and a tax on the interest which ceased by reason of the death, the two being different objects of taxation."

The quotation from Hanson referred to is found at page 49 of the opinion, where, referring to a probate duty upon the whole estate in distinction from the legacy tax upon a separate legacy, he says:

> "What it [the probate duty in distinction from the legacy tax] taxes is not the interest to which some person succeeds on a death, but the interest which ceased by reason of the death."

Conversely, therefore, what the legacy tax taxes is not the interest which ceased by reason of the death, but the interest to which some person succeeds on such death.

This distinction is carefully observed in *Knowlton vs. Moore* in applying the act under consideration, and, as pointed out above, it is held there that the tax under this act is not imposed upon the interests which ceased, but upon the interest which arises by reason of the death.

A practical illustration of the application of such interpretation is found in the schedule set out in full at page 44 of the opinion in that case. It there appears that in that case, as in this, the residuary estate, which was of considerable value, was held in trust by the executors pending the determination of the several interests therein, and while so held no tax was assessed upon it, for the reason therein assigned to be as follows:

> "The remainder of said residuary estate is subject to contingencies, and the individuals who will ultimately become entitled to the same and their degree of relationship to the testator cannot be determined until after the termination of two lives now in being. The present value of the said remainder of said residuary estate, estimated as aforesaid, is $717,803.30."

This amount was not included in the taxable amount of the estate, but under Judge WHEELER'S construction of the act this amount would have been presently taxable at its full face value, without regard to whether the beneficial interests therein were vested or contingent and irrespective of whether or not they had a clear value. The situation there presented is not distinguishable from the present case.

The theory of the Court below in the present case may have been, that this tax was a probate duty upon the whole of the estate and attached to every part of the

estate as it passed from the testator; but, as shown above, such theory is in direct conflict with the decision of this Court that the tax is not a probate tax but a legacy tax, and that it is imposed, not upon the interest in the property which ceased by reason of the testator's death, but solely upon the interest to which the legatee succeeded on account of such death. It is, therefore, of no importance whether the property is in the hands of the executors or has passed to them as trustees, upon which point the Court below laid so much stress. The determining question is, what interest has the legatee in the property wherever it may be situated, for upon that interest alone is the tax imposed.

In this connection it should be noted that by an Act passed June 27, 1902, to provide for refunding certain taxes and for other purposes, Congress has defined the subject matter taxed as a "beneficial interest," thus directly following the decision on that point in Knowlton vs. Moore. This act provides for the refunding of such taxes "as may have been collected *on contingent beneficial interests* which shall not have become vested prior to July 1st, 1902," and directs that no tax shall thereafter be assessed or imposed under the War Revenue Act "*upon or in respect to any contingent beneficial interest* which shall not become absolutely vested in possession or enjoyment prior to said July 1st, 1902" (32 Stat., 406).

The tax is paid out of the legacy with respect to which it is assessed.

In connection with the imposition of such tax with respect to each separate legacy independently of any other legacy, and independently of the bulk of the estate, the opinion of the Court leads to the further conclusion that the tax in respect to each legacy is paid out of each legacy, and that the other legacies and the bulk of the estate are not responsible for the payment of such tax. In this connection it appears that the act of 1864, which, as shown above, has

been construed to be identical both as to the subject taxed and as to the method of taxation with the act of 1898, was amended in 1866 by the addition of a provision that a legacy tax paid under said act of 1864 "should be deducted from the particular legacy or distributive share on account of which the same is charged." Exactly the same provision has been added to Section 30 of the present Act by the amendment of March 2, 1901.

Referring to such provision at page 69 of the opinion, the Court says:

> "In other words, the Act expressly commanded that to be done, which it was impossible should be done compatibly with any hypothesis that the tax was on the whole personal estate, for, as we have seen, under that assumption the deduction of the tax from the whole estate was essential."

The converse of this is equally true, for it would be inappropriate, under the construction which the Court has given to the Act, to subject the whole estate to a tax assessed with respect to each separate legacy. The direct and appropriate way of collecting such tax is out of the property passing under the legacy with respect to which it is assessed. The Court holds (at pages 71, 67, 66, 65, as above stated) that the tax is levied not on the whole amount of the estate before passing, but upon the passing of each separate legacy. Some of these legacies are exempt from taxation—for example, to a husband or wife, or any legacy not exceeding $10,000. It could not have been intended that legacies which were expressly exempted should bear the burden of a tax on other legacies. Furthermore some legacies pass sooner or later than others, so that to make the tax with regard to each legacy payable out of the whole estate or out of any other legacy than the particular one taxed, or to make the paying over of any legacy and the distribution of the estate dependent upon the payment of the tax upon any other legacy,

would be most confusing and cumbersome in the settlement and administration of an estate. Moreover such a construction of the Act would be inconsistent with the decision in the case of *Knowlton vs. Moore*, where the tax was held to be not on the property passing, but on the right of the legatee to an interest in property under each separate legacy; therefore Congress could not have intended to provide that a tax on the right of one legatee to receive property should be paid out of the property of any other legatee.

Fitzgerald vs. Rhode Island Hospital Trust Co., 52 Atl. Rep., 814.

This view of the question was evidently taken by Congress, for, in the light of the decision of *Knowlton vs. Moore*, the Act was amended, as stated above, by the addition of exactly the same provision as was added by the amendment of 1866 to the act of 1864, above referred to, expressly commanding, in the words of Mr. Justice WHITE, "that to be done which it was impossible should be done compatibly with any hypothesis that the tax was on the whole personal estate."

The tax is to be computed not upon the value of the property passing to executors or trustees merely, but upon the clear value of the interest of the beneficiary therein.

The attention of the Court is here called to the language of the five subdivisions of Section 29 of the Act, providing for the determination of the amount of the tax to be imposed upon such beneficial interest. In each of the divisions the following language appears:

> "Where the person or persons entitled to any *beneficial interest* in such property shall be [related in a certain degree or unrelated] to the person who died possessed of such property, as aforesaid, the tax shall be at the rate of [$] for each and every hundred dollars of the *clear value of such interest in such property.*"

These provisions introduce an additional element which must be present in any case in order to justify the imposition of a tax, and that is, that the *beneficial interest* referred to upon which the tax is imposed must have a clear value, for only upon such clear value can the tax be computed.

This is further shown by the provisions of Section 30, supplying the regulations for the assessment and collection of the tax. Section 30 is in part as follows:

> "Every executor, administrator or trustee, before payment and distribution to the legatees, or any parties *entitled to beneficial interest therein*, shall pay to the collector or deputy collector * * * the amount of the duty or tax assessed upon such legacy or distributive share, and shall also make and render to the said collector or deputy collector a schedule, list or statement in duplicate, of the amount of such legacy or distributive share * * * which schedule, list or statement shall contain the names of each and every person *entitled to any beneficial interest therein, together with the clear value of such interest.*"

The information required by the Act, in order that the tax may be assessed, is a statement from the executors, administrators or trustees, containing the names of "each and every person entitled to any beneficial interest" in the property held by them, "together with the clear value of such interest." So here again it appears that the ascertainment of the beneficial interest and of the clear value of such interest is essential to the assessment of the tax.

Thus the Act is found to be harmonious and consistent in all its provisions under the construction given it in Knowlton vs. Moore, namely: That the tax is not upon property, or upon the mere passing of property, but solely, in the case of a legacy, upon the

beneficial interest of a legatee in his legacy, upon the clear value of which the tax is computed.

In the light of these provisions and of this Court's analysis of the Act the meaning of Section 29 becomes perfectly clear in this connection. So far as it relates to this case it may be read as follows:

Persons having in charge as executors or trustees any legacies arising from personal property passing from the testator are made subject to a tax. The tax, however, is not on the executors or trustees nor upon the personal property passing. The property is subject to a lien for the tax and the executors or trustees are charged with the duty of paying the tax, but the tax itself is upon the beneficial interest of the legatee in such property, upon the clear value of which interest the tax is to be computed at the rate specified in the several subdivisions of the section.

In this connection attention is called to the definition of a beneficial interest as given by Bouvier wherein the distinction between the interest of a beneficiary and a mere custodian is clearly drawn:

> "BENEFICIAL INTEREST. Profit, benefit, or advantage resulting from a contract, or the ownership of an estate as distinct from the legal ownership or control.
>
> "A *cestui que trust* has the beneficial interest in a trust estate while the trustee has the legal estate."
>
> Bouvier's Law Dictionary, Rawle's Revision, Vol. I., p. 228.

The Court below took no notice whatever of the requirement that the tax is to be computed on the clear value of the beneficial interest of a legatee and refused to consider what was the character of the particular interest with respect to which it was alleged that the tax was assessed. But it is obvious that the clear value of an interest cannot be arrived at unless the character of the interest be first determined,

and until the value of the interest is arrived at there is no basis upon which to compute the tax. If the passing of the property under the legacy is postponed, the clear value of the interest therein depends upon the conditions postponing the possession of the property, or the vesting of the interest therein, and if the conditions are such that the legatee may never get possession or have the enjoyment of the property, his interest in the property is of no present value, and its clear value cannot be determined until and unless it ultimately actually comes into the possession or enjoyment of the legatee, and consequently no tax can presently be computed thereon.

RECAPITULATION.

In conclusion, therefore, it appears that the tax imposed with respect to a legacy under the Act of 1898 is a tax upon the interest in property to which a person succeeds upon another's death, and that such interest must be a present beneficial interest of a legatee and not merely a trustee's interest as custodian of the property, which is not a beneficial interest and has no clear value upon which to compute the tax, and conversely it appears that the tax is not upon the property itself, nor upon the mere passing of property, nor upon an interest in property which ceased by reason of death. It is further evident that, under this Act a legacy tax has nothing to do with the bulk or value of the estate of the testator, but only with the legatee's interest in the particular legacy out of which the tax is payable, and, although it is payable out of such legacy, it is not computed upon the value of the property passing under such legacy, but only upon the clear value of the beneficial interest in such legacy, and consequently, that unless and until such interest has a clear value, no tax can be assessed.

POINT II.

The tax was intended to attach only to present interests and the assessment and collection of taxes upon future rights or interests which are contingent, or which if vested are subject to conditions subsequent which may prevent them ever coming into possession, must be postponed until they become absolutely vested.

Section 29 of the War Revenue Law directs that a tax shall be assessed with respect to each beneficial interest in property passing by will or the intestate laws of any state, at a certain rate per cent. of the "clear value" of the interest taxed, the rate being determined primarily by the relationship of the decedent to the beneficiary and progressively increased according to the value of his interest. Before such a tax can be assessed, therefore, two things must concur: First, there must exist a beneficial right to, or interest in property having a "clear value," which is of at least ten thousand dollars ($10,000); second, there must exist a person or persons certainly entitled to take that property or interest in property and with respect to whose interest the tax can be assessed.

These requirements are not present in gifts of contingent or defeasible future interests which may never vest in possession. At least one of the elements essential in the computation of the tax is always lacking in such bequests, and in many cases both elements are absent.

Examples of the commonest limitations will illustrate the impossibility of *assessing* or *computing* a tax on future interests that may never vest in possession or enjoyment. For instance, if a bequest of property is limited upon a contingency with a double aspect so that as the event upon which the bequest is to take effect happens one way or the other the property will

go to A, who is a lineal descendant of the testator, or to X, who is not of his blood, obviously no tax can be assessed upon the transfer until the contingency happens. Until that time it is impossible to fix the *rate* of the tax. Moreover, until such time it is also impossible to determine "the clear value" of the interest of the ultimate beneficiary in the property which is the subject of the legacy, although the present value of the property itself that will ultimately pass to one or the other of the possible beneficiaries can then be appraised. Certainly, neither *the right or interest of A nor the right or interest of X* in such a case can be said to have a clear value until it is definitely known to which one of them the property will "pass." These laws are intended to tax only real and substantial rights and neither of the possible beneficiaries of property so bequeathed has any real or substantial ownership at the time of the testator's death.

Or consider a case of successive life interests in property, as a bequest to A for life, then to B for life, and after the death of B to C absolutely. In such case the relationship of B to the testator is, of course, ascertainable at the time of the testator's death. That factor in the determination of the amount of the tax is then fixed, and yet no tax can be imposed upon B's right to take until the death of the first life tenant. B may survive A, in which event his life estate will be of value; on the other hand, he may predecease A, in which event no one would pretend to say that his interest in the property bequeathed had been of any value whatever. Reference is made hereafter to a case decided under a law identical in all its essential features with the law under consideration here in which it was held that taxation of such an interest must be postponed until the death of the first life tenant, for the reason that until that time it had no "clear value" *(Matter of Hoffman, infra).*

Or take the following limitations, which are identical in their character with the limitations of Mr. Vanderbilt's residuary estate. Suppose a bequest

of personal property to trustees to pay the income to A, a son of the testator, until the year 1910, and thereupon to pay the principal of the trust fund to B, another son of the testator or his issue, if he leave issue surviving him; or, if B shall die before the year 1910 without issue then to hold the property in trust and pay the income therefrom to C, a third son of the testator, until the year 1915, and then to pay over the principal of the property to C, or, if C shall die before that time without issue then to pay the principal to X and Y, daughters of the testator. These gifts would be valid at common law. Certainly no one would contend that under the War Revenue Law a tax could be assessed immediately upon the death of the testator upon the rights in the trust fund of any of the named children of the testator except A's present interest in the income. In the first place, there is a possibility in such case that all the children of the testator may die prior to the year 1910, the time fixed for the termination of the first trust. In that case the principal of the trust fund would go to persons other than lineal descendants of the testator, and consequently prior to that time the relationship of the ultimate beneficial remaindermen could not be certainly determined. More important, however, is the fact that none of the estates after the first estate for years would have a "clear value" at the testator's death for the reason that it could not then be known which, if any of them, would ever ripen into actual ownership. Knowing the respective ages of the several children of the testator, by reference to mortality tables one could learn with a near approach to accuracy the percentage of chances that each of the children would have of coming into possession or enjoyment of the income or the principal of his property; similarly the percentage of chances that persons other than the lineal descendants of the testator would have of receiving the property might be estimated, and using these several percentages as a basis it would be possible to fix a certain specula-

tive value on the interests of the respective possible beneficiaries of the property. But that values estimated in this manner would represent the present "clear values" of *beneficial* interests in the property in the sense in which the word "beneficial" is used in the statute would not be claimed by any taxing officer. Actual beneficial ownership is what these statutes are designed to reach, and where such ownership is suspended or indeterminate taxation must in all cases be temporarily postponed. Wherever this question has been raised under laws similar to the Act under consideration here the Courts have uniformly so held.

The impossibility of taxing future interests which are contingent or, if vested, subject to a condition that may prevent them ever coming into possession, under any scheme of strict succession or legacy taxation, and the nature and theory of the legislation that must be resorted to in order to enable the State to reach such interests are so well illustrated by the several inheritance and legacy tax laws in force from time to time in the State of New York and the decisions under these statutes that reference is made to them at some length.

The first New York transfer or legacy tax law was passed in 1885. This law, as amended in some slight particulars in 1887, provided in part as follows:

> "SEC. 1. After the passage of this act all property which shall pass by will or by the intestate laws of this state, * * * to any person or persons, or to any body politic or corporate, in trust or otherwise, or by reason whereof any person or body politic or corporate shall become beneficially entitled in possession or expectancy, to any property or to the income thereof, other than to or for the use of [certain persons exempt from taxation] shall be and is subject to a tax of five dollars on every hundred dollars of the clear market value of such property. * * *"
>
> "SEC. 2. When any grant, gift, legacy or suc-

cession upon which a tax is imposed by section first of this act, *shall be an estate, income or interest for a term of years or for life, or determinable upon any future or contingent event, or shall be a remainder, reversion or other expectancy, real or personal, the entire property or fund by which such estate, income or interest is supported, or of which it is a part, shall be appraised immediately after the death of the decedent, at what was the fair and clear market value thereof* at the time of the death of the decedent, in the manner hereinafter provided, and *the surrogate shall thereupon assess and determine the value of the estate, income or interest subject to said tax, in the manner recorded in section thirteen of this act, and the tax prescribed by this act shall be immediately due and payable.* * * *"

"SEC. 13. * * * the value of every future or contingent or limited estate, income or interest shall, for the purposes of this act, be determined by the rule, method and standards of mortality and of value, which are employed by the superintendent of the insurance department in ascertaining the value of policies of life insurance and annuities."

Laws (N. Y.) 1887, Chap. 713.

These sections contained the only provisions in the law defining the tax and the mode of its assessment.

The language of this Act was so singularly involved and obscure that the precise character of the tax intended to be imposed was at first a matter of considerable perplexity to the courts. When, however, a situation arose that required a definition of the exact meaning of the law in this respect, the Court of Appeals held "that the tax imposed under the Act is a tax on the right of succession, under a will, or by devolution in case of intestacy"—a conclusion from which Judge GRAY dissented in an elaborate opinion.

Matter of Swift, 137 N. Y., 77, at p. 88.
See, also, *Matter of Davis*, 149 *id.*, 539, at pp. 546–7.

Thus, it will be observed, the character of the tax imposed by this law, as construed by the highest court of the State, was identical in its nature with the tax imposed by the Federal law of 1898, as construed by this Court in *Knowlton vs. Moore*, and not only was the tax imposed by the two laws of exactly the same character, but the provisions for computing the amount of the tax were in all respects similar, each statute providing for the computation of the tax at a certain rate per cent. of the clear value of the beneficial interest transferred. Further, each law required the tax upon each separate legacy or distributive share to be paid by the executor or trustee having it in charge before payment or distribution to the beneficiary.

The language of this New York law of 1885 was so broad—in terms imposing a tax upon every bequest, whether present or future, vested or contingent, and however remote and unsubstantial—and the provision that the tax imposed should be immediately due and payable was so unequivocal, that at first surrogates' courts throughout the State assessed a tax upon all contingent and conditional future interests based upon estimated values of the interests computed with the aid of mortality tables. As soon, however, as the question of the power to tax such interests immediately upon the death of the testator and prior to their falling into possession or vesting indefeasibly in interest was brought before the Court of Appeals the practice of the lower courts was promptly and unqualifiedly condemned, and both the appraisement and taxation of all such interests were postponed, for the reasons above stated. The opinions of the Court in certain of the cases in which this question was presented contain unusually forcible statements of the argument upon which the decisions were rested, and for the convenience of the Court the facts and portions of the opinions in these cases are briefly stated.

In the *Matter of Curtis*, 142 N. Y., 219, the facts

were, that one Clarissa E. Curtis had created a group of trusts for the benefit of her two daughters and two named grandchildren during their respective lives, and had bequeathed the remainder of the trust funds to such of her nephews and nieces as should be living at the termination of the several trusts, or if any of her nephews or nieces should then be dead, to their then living issue. It was held by the Court of Appeals that these remainder interests were not taxable, the Court saying, at pages 222, 223:

> "If, in the end, these remainders go to the nephews and nieces a tax will be imposed, but if, instead of passing to them, the remainders should go to the children and grandchildren they would be exempt from taxation [lineal descendants not being taxed by the provisions of the Act]. *Under this will, however we may speculate as to the technical location of the fee pending the running of the trusts, the actual and beneficial interest in remainder may pass wholly to the two daughters by intestacy* * * * *so that until the termination of the trusts it will be impossible to know whether the remainders are in truth taxable or not. Prior to that event the State cannot establish that any beneficial interest will pass to persons in whose hands it will be taxable,* and until it can show that vital and necessary fact its right to the tax cannot arise * * * . The only possible answer is that made by the surrogate. He says that the remainders vested in the nephews and nieces at once upon the death of the testatrix and so became contingent interests taxable under the law. *If that technical vesting be admitted, what so passed was rather a theoretical possibility than a tangible reality,* * * * . *It was never intended by the law to tax a theory having no real substance behind it* * * * . *The law itself gives abundant evidence in its language of the intent to subject only real and beneficial interests to taxation,* and

nothing in its policy justifies the imposition of such a burden where no corresponding benefit has been received."

In another case, *Matter of Roosevelt*, 143 N. Y., 120, the facts were that a testator bequeathed his residuary estate to his executors and executrix in trust to pay the income thereof to his wife during her life. He then gave, after the death of his wife, seven annuities —to two persons one thousand dollars each, to three persons five hundred dollars each, and to three persons five thousand dollars each, with interests in these latter annuities in the nature of cross-remainders. Subject to the payment of these annuities the residuary estate was bequeathed after the death of the wife to the testator's twelve nieces and nephews. Two questions were presented to the Court of Appeals—first were the annuities created by the will presently taxable upon the death of the testator and could their fair and clear value be ascertained at the time of the death of the testator, and, second, was the fair and clear market value of the estates in remainder subject to the annuities ascertainable at the time of the testator's death, and was the tax due thereon at once? The Surrogate's Court had answered each of these questions in the affirmative. The General Term of the Supreme Court had reversed the Surrogate. The Court of Appeals sustained the General Term, and held that none of the interests in the testator's property other than the wife's present interest in the income was taxable at the time of the testator's death. The Court said, in part, at pages 123, 124 :

"It does not follow because the Legislature taxes persons beneficially entitled to property or income, in possession or expectancy, that a tax was thereby imposed upon an interest that may never vest; until that time arrives the power to tax does not exist. *The testator has created seven*

> *life annuities, if the annuitants survive his wife, and there can be no vested interest in any of them until the happening of that event. All may survive —a portion may be living—every one may be dead. To hold such a possibility presently taxable, and its value capable of immediate computation, shocks the sense of justice.* This brings us to the remaining question as to the taxation of the estates in remainder. * * * It is contended by the respondents that it is impossible to ascertain the fair and clear market value of these remainders at the time of the death of the testator for the reason that the annuitants represent estates or interests, * * * which, taken in connection with the life estate of the widow, renders the present value of the ultimate remainders unascertainable. * * * In the case cited *(Matter of Curtis, supra)* it was held that the nominal fee might never become a taxable estate, for the reason that if the nephews and nieces in whom it was claimed to have vested died without issue before the termination of certain trusts the fee would pass to lineals not taxable. This was the uncertainty which postponed the payment of the tax. *In the case at bar there is a contingency affecting the value of the estate, as already indicated, which brings it strictly within the principle of the Curtis case.*"

In 1892 the New York law was recast and the Legislature, recognizing the impossibility of taxing interests that have no clear or market value, in any scheme of succession or legacy taxation, introduced into the revised statute the following provision :

> "All taxes imposed by this act shall be due and payable at the time of the transfer, provided, however, that taxes upon the transfer of any estate, property or interest therein limited, conditioned, dependent or determinable upon the happening of any contingency or future event by

reason of which the fair market value thereof cannot be ascertained at the time of the transfer as herein provided shall accrue and become due and payable when the persons or corporations beneficially entitled thereto shall come into actual possession or enjoyment thereof" (Laws 1892, Chap. 399, Sec. 3).

This clause is, of course, but a codification of the principles upon which the cases cited above and a number of earlier cases involving somewhat similar states of facts were decided. The most important of these earlier cases is *Matter of Cager*, 111 N. Y., 342, decided in November, 1888, which first directed attention to the fact that full force could not possibly be given to the comprehensive language of the Act of 1885 as amended in 1887. The Laws of 1892 and 1887 were alike as regards the form of the taxes imposed and the method of their computation and assessment, and as well after this amendment of 1892 as before, it became necessary in every case involving the taxation of future interests to first determine whether such interests had a clear or fair market value. The leading case upon this subject under the Law of 1892 is *Matter of Hoffman*, 143 N. Y., 327. The facts in that case were that a testatrix bequeathed a fund of $50,000 to her executors in trust, to pay the income to her mother for life, and after the death of the mother to her daughter E. for life, and after the death of E. to pay the principal to the issue of E., if any. The question was whether the life interest of the daughter E. was taxable as of the date of the death of the testatrix. This interest was absolutely vested. The relationship of E. to the testatrix was, of course, determinable at the latter's death, and yet the Court held that the estate was not taxable until it vested in possession. Judge FINCH, speaking for the Court, said at pages 333, 334:

"By the will the mother took a life estate. If upon her death E survives, the latter will take a

life estate, but if she dies before her mother E will take nothing, and have no estate to be taxed. In that event there will have been no actual transfer to her of any portion of the property of the decedent. She ought not to be taxed until events make it certain that there is an actual and beneficial transfer of the property to her."

* * * * * *

" *We are obliged to follow one of two lines of construction. We must open all the nice and difficult questions which arise under a will as to the vesting of technical legal estates although future and contingent, and assess the tax upon what are in reality only possibilities and chances, and so complicate the statute with the endless brood of difficult questions which gather about the construction of wills; or we must construe it in view of its aim and purpose and the object it seeks to accomplish, and so subordinate technical phrases to the facts of actual and practical ownership.* For taxation is a hard fact, and should attach only to such ownership, and may properly be compelled to wait until chances and possibilities develop into the truth of an actual estate possessed, or to which there exists an absolute right of future possession. *I am not shutting my eyes to the statutory language, which is quite broad. The property taxed may be an estate 'for a term of years or for life or determinable upon any future or contingent estate', or 'a remainder, reversion or other expectancy,' and the tables of mortality may be resorted to for the ascertainment of values. And yet, it is the 'fair market value,' the 'fair and clear market value' which is to be assessed,* and with the priviso that if that value cannot be at once ascertained the appraisal is to be adjourned. *I can scarcely imagine a contingency depending upon lives which mathematics could not solve by the doctrine of chances and the averages of mortality, and there could hardly be an adjournment unless upon some rare contingency having no averages, and*

the results in cases dependent upon lives might still leave the 'fair and clear market value' in doubt and yield sums which no sale in the market would produce."

As we have already pointed out, the New York laws under consideration in all these cases were similar in respect to the character of the tax imposed, the method of its assessment and the direction as to its payment, to the provisions of the War Revenue Law, and the argument upon which the decisions referred to were made applies with equal force to the question of taxation of like interests under the Federal law.

The New York law of 1892 remained in force without material amendment affecting taxation of such interests as we are here concerned with until 1899.

In the year 1899 a marked change took place in the policy of the State with respect to the taxation of future interests, which resulted in an entire change in the character of the then existing law. By Chapter 76, Section 1, of the laws of that year, Section 230 of the Tax Law, of which the law relating to taxable transfers had been made a part, was amended so as to direct the appraisement and assessment of a tax immediately upon the death of a testator or intestate upon every conceivable interest in his property, present or future, vested or contingent. The language of the statute was most comprehensive. In so far as it affected the taxation of contingent or conditional future interests, it was as follows :

"* * * Whenever a transfer of property is made, upon which there is, or in any contingency there may be, a tax imposed, such *property* shall be appraised at its clear market value immediately upon such transfer, or as soon thereafter as practicable. The value of every future or limited estate * * * shall be determined by the rule, method and standard of mortality and value employed by the superintendent of insurance in ascer-

taining the value of policies of life insurance and annuities * * *.

"When property is transferred in trust or otherwise, and the rights, interest or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, *a tax shall be imposed upon said transfer at the highest rate which, on the happening of any of the said contingencies or conditions, would be possible under the provisions of this article, and such tax so imposed shall be due and payable forthwith, out of the property transferred;* provided, however, that on the happening of any contingency whereby the said property, or any part thereof, is transferred to a person or corporation exempt from taxation under the provisions of this article, or to a person taxable at a rate less than the rate imposed and paid, such person or corporation shall be entitled to a return of so much of the tax imposed and paid as is the difference between the amount paid and the amount which said person or corporation should pay under the provisions of this article, with legal interest thereon from the time of payment."

Laws (N. Y.) 1899, Chap. 76.

This law was passed six months prior to the death of Mr. Vanderbilt and the effect of the provision quoted was brought before the higher Courts for the first time in a proceeding for the assessment of the transfer taxes upon his estate.

The State Comptroller claimed that under this provision of the revised law the State was entitled to collect from the executors and to have paid out of the residuary estate, a tax computed upon the value of Alfred G. Vanderbilt's future interests in the residue as "determined by the rule, method and standard of mortality and value employed by the superintendent of insurance in ascertain-

ing the values of policies of life insurance," regardless of the fact that such an amount would not represent the "clear or fair market value" of such interests or the fact that such interests have no clear value. He contended that while the language of the amendment might not be entirely appropriate to the purposes of the Legislature, still the Legislature evidently intended to impose such a tax; that full effect must be given to that intention, if possible, and that effect could be given to that intention if the tax imposed were regarded as an exercise by the State of its right to deduct from the estate of a decedent such portion of the estate as it should see fit, in the exercise of its power to regulate or to impose conditions upon the devolution of the property of a decedent within its jurisdiction.

The executors, although compelled to admit that the Legislature intended by this provision to reach all property passing by will or the intestate laws of the State immediately upon the death of the decedent, however such property might be limited, contended that the Legislature had failed of its purpose. Their argument was, briefly, that in spite of the amendment the tax imposed by the law remained a transfer tax or a tax upon the right to receive beneficial interests in property computed upon the "clear value" of such interests; that the question as to the right of the Comptroller to assess a tax on the several interests in the residuary estate was governed by section 222 of the Tax Law, which was not repealed when the amendment quoted was passed, and which provided that taxes upon the transfer of any estate dependent or determinable upon the happening of any contingency or future event by reason of which the fair market value thereof could not be ascertained at the death of the testator, should not be due and payable until the persons or corporations entitled thereto should come into the actual possession thereof, and under this latter section the de-

cisions in *Matter of Hoffman*, *Matter of Cager*, *Matter of Roosevelt*, *Matter of Curtis*, and similar cases were controlling; and that if the Legislature desired to tax contingent or future defeasible interests immediately upon the death of a testator, it must provide a new and different method for the computation of the tax.

The lower Courts sustained the contention of the executors. The Court of Appeals, by a vote of four to three, sustained the contention of the Comptroller. The majority of the Court upheld the right of the State to collect the tax upon the ground that the nature of the tax imposed by the law had in fact been changed by the amendment and that the collection of a tax upon interests of the character described in the provision quoted from Section 230 was an exercise by the State of its right to retain to itself a part of the estate of a decedent by virtue of its power to regulate the right of succession to property upon death. Upon the construction of the law, Judge HAIGHT, writing one of the prevailing opinions, said (*Matter of Vanderbilt*, 172 N. Y., 69, at page 72):

> "It seems to me clear that the Legislature by this amendment intended to change the law upon the subject and to make the transfer tax, upon property transferred in trust payable forthwith. The tax is not required to be paid by the conditional transferee, for, by the provisions of the statute, it is to be paid 'out of the property transferred.' *So that whoever may ultimately take the property takes that which remains after the payment of the tax.*" This amendment makes provision for property transferred in trust. It, therefore, contemplates defeasible transfers as well as absolute transfers."

And Judge CULLEN said, at pages 73 and 74:

> "True, it cannot now be told who will ultimately enjoy the *corpus* of the estate till the life

tenant dies or arrives at the prescribed age. But the legislature might have forbidden the suspension of the absolute ownership of the property for any period whatever as it has forbidden suspension for more than two lives in being. As said by the Supreme Court of the United States of the [States] inheritance tax: 'The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege, and, therefore, the authority which confers it may impose conditions upon it. From these principles it is deduced that the states may tax the privilege.' (Citing *Magoun vs. Trust Company*, 170 U. S., 283; *Matter of Dows*, 167 N. Y., 227). Therefore, the state can say a devise or bequest may be made where the interests are contingent or the ultimate beneficiaries unknown till after some period, but in such case there shall be exacted from the beneficiaries, whoever they may prove to be, a tax to be presently taken out of the property. This, in effect, it has said, for the provision of the Transfer Tax Law under consideration was in force at the time of the testator's death."

See also *Matter* of *Brez*, 172 N. Y., 609.

The construction thus given by the Court of Appeals to the Act was further supported by Section 242 of that Act as amended, which is as follows:

> "The word 'estate' and 'property' as used in this act *shall be taken to mean the property or interest therein of the testator*, intestate, grantor, * * * passing or transferred to those not herein specifically exempted from the provisions of this act and *not as the property or interest therein passing or transferred to individual legatees.*"

The assessment of such tax under the New York State law was, therefore, due to the amendment changing the tax from one upon the legatee's right of succes-

sion, to a tax upon the whole bulk of the estate as it passed from the testator. In other words, the tax under the Act had been changed from a tax upon the interests which arose upon the testator's death to a tax upon the interests which ceased by reason of his death.

It also is to be noted that this amendment was sustained on the ground that it was an exercise of the right of the State to regulate and impose conditions upon the testamentary disposition of property.

The Federal tax, on the other hand, is imposed, not upon the passing of the bulk of the property as it goes out of the hands of the testator, but upon the separate beneficial interest of each legatee under his right by the State law to take a particular legacy, and it is further to be noted that the United States has not the unlimited power of the States in this direction, not having the right to regulate or impose conditions upon the devolution of property, but only to tax rights of inheritance when already established under the laws of the several States.

In conclusion, therefore, it appears that the decisions of the highest Court of the State of New York in interpreting the transfer tax law sustain the proposition that a tax of the character imposed under the Federal law cannot be assessed except against an absolutely vested present interest, and that the reasons assigned for this conclusion are the same as those assigned in the first point of this brief; namely, that a legacy tax, in distinction from a probate tax, cannot be assessed or collected with respect to or out of any bequests of property where there is no one in existence who has a fixed right to the present possession or enjoyment thereof, or who is not certain at some time to have the actual ownership thereof, because such tax is on the right to take and contingent or defeasible interests, or interests that may never vest in possession have no 'clear value' and a tax cannot either be imposed or computed with respect to them.

The same rule has been followed by the highest

courts of other States also, and without exception it has been held that contingent or defeasible interests or future interests which may never vest in possession are not taxable under laws imposing a tax upon successions, until all uncertainty as to their actual value and the ultimate right of succession has been removed.

In the case of *Billings vs. The People* (189 Ill., 472), in which the question arose, the facts were as follows: Albert M. Billings died leaving a will by which, as it was construed by the Court, he bequeathed two-thirds of his residuary estate to his son, Cornelius N. G. Billings for life, and one-third to his grandson Albert M. B. Raddock, for life, with a gift over to his grandchild of the property bequeathed to the son in case the son should die without leaving issue, and a gift over of the property bequeathed to the grandchild to the testator's brother and nephews and nieces in case the grandchild should die without issue. It was held that the assessment and collection of the legacy tax upon all the remainder interests must be postponed until the termination of the life estates.

Upon this question the Court said, in part (p. 486):

> "How can estates depending upon such contingencies be valued and taxed at the rates provided by the statutes? It is to be borne in mind that the tax is levied on the succession and not on the property as such, and the rate and the exemptions must be determined by the succession, and it would seem to follow, necessarily, that when the basis of the tax cannot be fixed the tax itself cannot be fixed. It is, however, made a lien on the property, which will continue until the uncertainties change to certainties, as they will in time, when it may be collected.
>
> "We find upon examining the authorities that the courts of last resort in other States have found it necessary to take substantially the same view in interpreting statutes similar to the one under consideration. Among many cases, see *In re Roose-*

velt's Estate, 143 N. Y., 120, and *In re Hoffman's Estate*, *id.*, 327.

"The tax imposed by section 1 of our statute is fixed upon the 'clear market value of the property received by each person' at the prescribed rate,—that is, as shown by the context, the clear market value of the beneficial interest so received. Surely, by such language it was not intended by the legislature that the courts should undertake to ascertain the clear market value of a mere possible interest which, from its very nature, could not have any market value, and which, for all practical purposes, such as taxation, is incapable of valuation. The courts, in order to enforce the immediate collection of such taxes, as the statute seems to contemplate shall be done, cannot change the tax from one on succession to one on property; nor can they classify such remote and contingent interests, and fix the tax or rate of tax upon the whole class, as possibly the law-making power might do or provide for. No other course is left open in the practical administration of the statute than to postpone, as was done in this case, the assessing and collecting of the tax upon such remote and contingent interests as are incapable of valuation and as to which the rate and the exemptions cannot be determined. It is apparent that in many cases the tax on remainders, mentioned in section 2 as becoming immediately due and payable, can be immediately ascertained and collected; but in other cases, while, in contemplation of the statute, they are due and payable and remain a lien on the property, their payment cannot be enforced until the amount can be determined by the happening of the event or fulfillment of the conditions upon which the beneficial estate itself is made to depend. This construction of the statute leads to its broadest, fairest and fullest enforcement, while to so construe it as to require the fixing and collection of the tax, immediately

upon the death of the donor, upon all interests in property passing or to pass upon any contingency, would embarrass, and for practical purposes might have the effect to defeat, the full operation the statute was intended to have."

See, also *People vs. McCormick*, 208 Ill., 437.
In that case the Court said:

"It is contended on the part of appellant that each of the three children of the testator takes a vested interest in the property that is to pass from the trustee at the termination of the twenty-year period, while the view of counsel for appellees is that the interests devised in that property, which are to vest in possession at the end of that period, are contingent remainders. We will not indulge in any nice distinctions for the purpose of determining whether or not the interest in this residuary estate, into the possession of which each of the children of the testator is to enter at the end of the twenty-year period, is, in the technical meaning of the term, a vested estate. If it can be said to be vested it is subject to a condition of defeasance, because if either of the children of the testator dies prior to the expiration of the period his or her title to this property will thereby be defeated. Nothing is left but a power of appointment, which may or may not be exercised, and it is therefore wholly uncertain at this time who will, when the twenty years shall have elapsed, possess the beneficial interest in this property, or in what proportion this property will be divided among the persons who succeed to the beneficial ownership thereof.

"The condition contemplated by our statute as that which should authorize the imposition of the tax is one of practical and actual ownership, the possession of a title to something that can be conveyed. If either of the children of the testator,

in this case, should convey by deed, his or her interest in the remainder and die before the expiration of the twenty years, the purchaser would take nothing, and under such circumstances to impose a tax upon either of the children of the testator on account of the right to succeed to the interest in the residuary estate would be to tax the shadow, and not the substance. It would result in taxing appellees upon their right to succeed to property, when, so far as any beneficial ownership is concerned, there never was a right of succession. The right to succeed, under such circumstances, is, for all practical purposes, a myth. Taxation to the tax-payer is intensely real. It should not be levied upon that which is unreal. If the estates now under consideration are contingent they cannot be taxed until they are vested. If they are now vested they are subject to an estate for years and subject to defeasance, and cannot be taxed until they become indefeasible.

* * * * * *

"The right to tax is based upon the right to succeed. The amount of the tax is fixed by the amount of the property which, as a result of the right to succeed, passes to the beneficiary. The tax is levied on the succession, and not on the property as such. The rate must be determined by the amount of the succession where the beneficiary is a stranger, and the exemption, if any, must be determined by the identity of the person who succeeds. When the basis of the tax, the rate and the exemption, if any, cannot be fixed, the tax itself cannot be fixed. No other course is left open, in the practical administration of the statute, than to postpone the assessing and collecting of the tax upon such remote and contingent interests as are incapable of valuation and as to which the rate and the exemption cannot be determined (*Billings v. People*, 189 Ill., 472; *In re Hoffman's Estate*, 143 N. Y., 327; *In re Roosevelt's*

> *Estate, id.*, 120, * * *.) [Citing other New York cases.] As is suggested by Mr. Justice FINCH in the *Hoffman case, supra*, 'the State will get its tax when the legatees get their property.'"

In Massachusetts the same result was reached in the case of *Howe vs. Howe* (179 Mass., 546), which is practically identical with the case at bar. A testator bequeathed $40,000 to his executor in trust to pay the income to Gurdon S. Howe until he arrived at the age of forty-five years, and then to pay over the principal to him. If he should die before reaching that age, then the principal was to go to such heirs of his body as should be living when he would have reached the age of forty-five years, and in default of such heirs then to his widow for life, with the remainder over to two institutions exempt from taxation. It was admitted that the interests of Howe until he attained the age of forty-five were subject to a tax; but it was held that the taxation of his other interests should be postponed until he attained the age of forty-five years.

The Court said, at page 550:

> "In regard to the fund of $40,000, it [the Probate Court] ruled that any interest to which the two institutions may become entitled was exempt, but that any interest to which Gurdon S. Howe will become entitled if he attains the age of forty-five, or to which the heirs of his body or his widow may become entitled if he dies before arriving at that age are subject to the tax, and that such tax shall be paid by the executor *when the time arrives* and that the determination of the value of such future interest be postponed until the happening of said event.
>
> "We think that these rulings were right."

It is respectfully submitted, therefore, both in the light of the conclusions flowing from the analysis of the Act and on the authority of the decisions of the

State Courts in passing upon questions arising under similar acts, that it is evident that it could not have been the intention of Congress under Sections 29 and 30 of this Act, to impose a tax upon any but an absolutely vested present beneficial interest in a legacy.

THE SUBSEQUENT ACTS OF CONGRESS RELATING TO THE WAR REVENUE ACT SHOW THAT IT WAS INTENDED TO BE CONSTRUED AND APPLIED AS IMPOSING A TAX ASSESSABLE ONLY UPON BENEFICIAL INTERESTS AND COLLECTIBLE ONLY WHEN SUCH INTERESTS ARE ACTUALLY PERFECTED EITHER IN POSSESSION OR ENJOYMENT.

If confirmation of the view hereinabove stated, of the intention of Congress, is required it will be found in the subsequent legislation relative to the taxation of these future interests.

On April 12th, 1902, Congress passed an act entitled "An Act to repeal war revenue taxation, and for other purposes." By Section 7 of this Act, which was to take effect on July 1st, 1902, Section 29 of the War Revenue Law was repealed. Section 8 of the Repealing Act provided, however, with respect to the collection of taxes which had then accrued under the repealed section, but which had not yet been collected, as follows:

> SEC. 8. "That all taxes or duties imposed by Section 29 of the Act of June thirteenth, eighteen hundred and ninety-eight, and amendments thereof, prior to the taking effect of this Act, shall be subject, as to lien, charge, collection, and otherwise, to the provisions of Section 30 of said Act of June thirteenth, eighteen hundred and ninety-eight, and amendments thereof, which are hereby continued in force, as follows:" (32 Stat., 96.)

Prior to the time that the Repealing Act took effect the attention of Congress was directed to the fact that in a number of instances certain Internal Revenue

Collectors had collected taxes upon contingent and conditional interests that might never vest in possession or enjoyment. Thereupon by an act passed June 27th, 1902, entitled "An Act to provide for refunding taxes paid upon legacies and bequests for uses of a religious character, etc., and for other purposes" it was provided in Section 3 as follows:

> "*That in all cases where an executor, administrator, or trustee shall have paid, or shall hereafter pay, any tax upon any legacy or distributive share of personal property* under the provisions of the Act approved June thirteenth, eighteen hundred and ninety-eight, entitled 'An Act to provide ways and means to meet war expenditures, and for other purposes,' and amendments thereof, *the Secretary of the Treasury be, and he is hereby authorized and directed to refund, out of any money in the Treasury not otherwise appropriated*, upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, *so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two. And no tax shall hereafter be assessed or imposed under said Act approved June thirteenth, eighteen hundred and ninety-eight, upon or in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to said July first, nineteen hundred and two* (32 Stat., 406)."

It will be observed that this statute, which was to take effect on July 1st, 1902, was both remedial and declaratory. By Section 8 of the Act of April 12th, 1902, the collection of all taxes, the right to which had accrued prior to July 1st, 1902, was provided for by continuing in force Section 30 of the old law. Under this saving clause taxes on all bequests of property made by a testator who died prior to the date

on which the Repealing Act was to take effect are payable in the same manner and at the same time as though Section 29 had remained in full force. Nevertheless with this provision in mind, by an act passed to take effect simultaneously with the Repealing Act, we find Congress expressly declaring that no tax should be collected "upon or in respect of *any contingent beneficial interest* which shall not become absolutely vested in possession or enjoyment prior to said July first, nineteen hundred and two," and further directing the refunding of all taxes already collected upon such interests.

For the purpose of determining the sense in which the words "vested" and "contingent" are used in this act, the words "absolutely" and "in possesion or enjoyment" are very significant. Had Congress intended to use the words "contingent" and "vested" in their technical legal sense the words "absolutely" and "in possession or enjoyment" would have been omitted. These words are not meaningless; they were intended to and do qualify and limit the meaning of the word "vested" as it is used here, making it refer to future beneficial interests which are certain to ripen into an actual ownership, and not to future interests technically vested but subject to a defeasance.

As stated by the New York Court of Appeals in the *Matter of Hoffman (supra)*:

> "We are obliged to follow one of two lines of construction. We must open all the nice and difficult questions which arise under a will as to the vesting of technical legal estates although future and contingent, and assess the tax upon what are in reality only possibilities and chances, and so complicate the statute with the endless brood of difficult questions which gather about the construction of wills; *or we must construe it in view of its aim and purpose and the object it seeks to accomplish, and so subordinate technical phrases to the facts of actual and practical ownership.* For taxation is a hard fact, and should at-

tach only to such ownership, and may properly be compelled to wait until chances and possibilities develop into the truth of an actual estate possessed, or to which there exists an absolute right of future possession."

An additional reason for following this latter course in the construction of the Federal Act is found in the requirement that the Act must be applied uniformly throughout the United States. This would be impossible if the question of the character of the interest to be taxed was determined by a different rule in each State, as would be the case if the Federal Courts should follow the varying definitions of what was technically a vested or contingent interest under the conflicting State laws. It would be intolerable to have the Federal Tax imposed on an interest in one State under some technical refinement of the laws of that State and an exactly similar interest escape taxation in another State through a loophole furnished by some different construction as to the character of the interest.

It is respectfully submitted, therefore, that both in reason and in justice it could not have been the intention of Congress under this law to impose a tax upon a mere theoretical possibility or probability, and that the interest to be taxed must be so construed that technical phrases shall be subordinated to the fact of actual and practical ownership.

In the case at bar the plaintiffs do not rely upon this refunding statute. This action was commenced before that act was passed, and rests on the contention that under the law of 1898 the Collector had no right to assess or collect this tax upon the future interests in the testator's residuary estate, because it was not then possible to determine in whom the beneficial ownership thereof would finally rest or to fix a "clear value" thereon, and also, that even on the basis on which the tax was assessed the amount of the tax assessed and collected by the defendant was excessive. We direct the attention

of the Court especially to this, for the reason that when the case was argued in the Court below counsel for the defendant apparently was of the impression that the executors relied upon the refunding act. At the same time there is no doubt that Section 8 of the Repealing Act and Section 3 of the Refunding Act clearly sustain the claim we make as to the nature of the tax imposed by the War Revenue Law, and the impossibility of collecting such a tax upon contingent or conditional future interests. It is an express declaration by Congress of the meaning of the law of 1898 with respect to the taxation of such estates.

POINT III.

By the seventeenth clause of the Will Alfred G. Vanderbilt has four separate and distinct interests in the residuary estate, one of which, namely, his right to receive the income in the entire residue until he becomes thirty years of age, is vested and subject to taxation, and three of which, namely, his right to receive one-half of the principal of the residue upon becoming thirty years of age, his right to receive the income in the other half of the residue until he shall become thirty-five years of age, and his right to receive the principal of the other half of the residue upon reaching that age, are all future interests and not presently taxable.

The theory as to the character of this interest upon which the Commissioner of Internal Revenue pro-

ceeded in assessing this tax, as appears from the statement of facts, was that by the mortality tables Alfred G. Vanderbilt, at his age at the time of his father's death, had an expectation of life beyond the expiration of the period of years during which he had a present interest in the income of the residue, and that, therefore, his contingent interest in the residue, dependent upon his outliving that period of years, became in some way merged and consolidated with his present interest in the income thereof, resulting in a present absolutely vested interest in the entire residue of the estate, and that, therefore, such interest was equal to the entire value of the residue and was subject to a tax on that basis without regard to the happening of the contingency or the postponement of the possession and enjoyment of such residue, and that such tax could be presently collected. The executors' objections to this theory of the Commissioner have been stated above.

Upon the trial of this case in the Court below the learned counsel for the defendant did not attempt to justify the collection of the tax in question upon the theory adopted by the Treasury Department in making the assessment. On the contrary, he undertook to support the assessment and collection upon the grounds, first, that the Act imposed a tax as of the date of the death of the testator upon all testamentary dispositions of personal property, and that where such property is bequeathed to trustees to hold for the benefit of others the amount of the tax must be determined by the full value of the trust estate at that time, although there might not then be in existence any person entitled to a beneficial interest therein, either in possession or expectancy; and, second, that, as stated in the brief for the defendant, "the legacy of the residuary estate to the executors in trust for Alfred G. Vanderbilt, who was to be paid such legacy when he arrived at a certain age, was a vested legacy with a suspension of enjoyment until he should reach a certain age, such suspension not being

a contingency and not constituting a contingent legacy."

It will be observed that the first argument of the counsel for the defendant was substantially the argument in the opinion of Judge WHEELER, which, as appears in Point I. of this brief, is inconsistent in its entirety with the decision in *Knowlton vs. Moore.*

With reference to the second contention of the counsel for the defendant, while the plaintiffs claim that a *technical definition* of Alfred G. Vanderbilt's interests in the residue is not material to the questions before this Court, they contend that the interests upon which the tax in question was assessed are not present but future, and not only future but contingent.

Referring again to the seventeenth clause of the will (*supra*, p. 2) of the testator, it will be recalled that he devised and bequeathed the residue of his estate to his executors in trust to pay the net income to his son Alfred until he arrives at the age of thirty years, " when he shall be put in full possession of one-half of the portion of said estate to be set apart for that purpose," and upon the further trust thereafter to pay to him the income from the balance of the residuary estate until he arrives at the age of thirty-five years, and then to put him in possession of such balance. It is further provided, however, that if Alfred shall die leaving issue before becoming entitled to the principal of the residuary estate the executors shall divide the residue among his issue; if he shall die without issue before that time they shall hold so much thereof as has not been paid over to him upon like trusts for the benefit of his brother. There are also provisions for the disposition of the estate in case neither Alfred, his issue, nor his brother shall become entitled to it. As appears in the statement of facts neither Alfred nor his brother Reginald were married at the time of the testator's death.

Under such provisions in the will, it is contended that Alfred G. Vanderbilt has four dis-

tinct interests in the residue of his father's estate, one of which—viz., the present right to the income of the estate, is vested, and three of which—viz., the right to one-half of the principal when he becomes thirty years of age, the right to the income of the remaining one-half of the principal until he reaches the age of thirty-five years, and the right to one-half of the principal when he becomes thirty-five years of age—are future, and not only future but by settled rules of construction and the manifest intention of the testator they are contingent.

Cases involving the question whether a legacy is contingent or vested with a postponement of possession merely have been before the Courts so frequently that certain general rules for its determination, which are everywhere recognized, have been established. So far as they bear upon the case at bar these rules may be conveniently grouped as follows:

(1) Where property is given to a person, if, or at, or when he attains a certain age, or where a gift of property is found only in a direction to executors or trustees to pay or transfer the same to a person, if, or at, or when he attains a certain age, and there are no words of gift independent of the direction to pay, the gift is future and is contingent.

Leake vs. Robinson, 2 Mer., 363.
Warner vs. Durant, 76 N. Y., 133 at p. 136.
Smith vs. Edwards, 88 N. Y., 92 at pp. 103, 104.
Goebel vs. Wolf, 113 N. Y., 405 at p. 412.

(2) Where a legacy is given or property is directed to be paid to a person if, or at, or when he attains a certain age, so that the legacy standing alone and unexplained would be contingent under the rule above stated, and the interest or income of the subject matter of the gift accruing during the interval between the death of the testator and the date fixed for payment is directed to be paid to, or appropriated for the benefit of such person, then it is held that the gift of the

interim income standing alone denotes an intention by the testator that the legatee should have an immediate vested interest in the principal, and that the words of futurity should refer only to the right to the possession of the legacy.

Warner vs. Durant, 76 N. Y., 136.
Smith vs. Edwards, 88 N. Y., 92 at p. 105.
Zartman vs. Ditmars, 37 App. Div., 173.

(3) Where, however, there is a gift of property to a person if, or at, or when he attains a certain age, or where there is a direction that property shall be paid to a person if, or at, or when he attains a certain age, accompanied by a gift of the intermediate income, so that in the absence of any other qualification the gift of the principal would be vested under the next preceding rule, but there is added a provision that if the legatee shall die before reaching the age at which he would become entitled to receive the legacy, the property shall be given to another, the gift over rebuts any presumption raised by the gift of the income and the legacy is contingent.

This last general rule of construction was stated substantially as above in the old English case of *Vawdry vs. Geddes*, 1 Russ. & M., 203, and has since been recognized and acted upon as the established law.

The limitations under consideration in *Vawdry vs. Geddes* were almost identical with the limitations contained in the will in question here. In that case A gave the residue of her estate equally between her four sisters, and directed that on the death of her sisters the interest of their respective shares should, at the discretion of her executors, be applied in the maintenance or should be accumulated for the benefit of the children of each of her sisters so dying until such children should severally attain the age of twenty-two years, and upon attaining that age that they should be entitled to their proportion of the mother's share of the principal. It was provided, however, that in case of the decease of any of such children under that age leaving

lawful issue, such issue should be entitled to their respective parents' shares, and, in case of the death of any of such children under twenty-two without issue, the share of the child so dying should be paid over to the other children of the testator's sisters. It was held that the interests of the children of the testator's sisters were contingent until they severally attained the age of twenty-two years, and that the share of a child dying under such age did not pass to his executors.

The Master of the Rolls deciding the case said that where interim interest is given, it is presumed that the testator means an immediate gift; but that presumption fails entirely when the testator has expressly given the legacy over in the event of the death of the legatee before a particular period.

The rule of *Vawdry vs. Geddes* is law in New York. In *Smith vs. Edwards*, 88 N. Y., at page 107, FINCH, J., referring to that case, said:

> "It was held that although the bequest of interim interest raises a presumption of an immediate gift intended, yet that presumption fails entirely when the testator has expressly given the legacy over, in the event of the death of the legatee before a particular period. That would seem to be the correct conclusion. If the testator in such case intended and understood an immediate gift vesting at his death, the legacy would go by operation of law upon the decease of such legatee to issue and survivors as next of kin. A clause of substitution aiming at precisely that result would be unnecessary and superfluous; and only important where the vesting was intended to be postponed, and for that reason a lapse of the legacies given was to be prevented."

This is not a dictum but a statement of one of the grounds upon which the Court held a bequest contingent and consequently invalid because it suspended the

power of alienation for more than two lives in being, contrary to the law of New York. The language of the learned Judge is peculiarly apt to the facts in the case at bar. Mr. Vanderbilt's will, it will be remembered, provides that in case Alfred G. Vanderbilt should die before attaining the age of thirty-five years, so much of the residuary estate as is then in the hands of the executors shall be divided among his issue, and that only in case he shall die without issue shall the property be held for the benefit of Reginald C. Vanderbilt or paid to his sisters. If the testator had intended that his son Alfred should take an immediate vested interest in the principal of the residue, it would not have been necessary to make an express gift to his children. In such case the property would go to his children as next of kin under the statute of distributions. The "clause of substitution aiming precisely at that result would be unnecessary and superfluous." The gift to the issue of Alfred G. Vanderbilt is important then as indicating that his interest in the principal of the fund is contingent upon his attaining the ages of thirty and thirty-five years.

The rule of *Vawdry vs. Geddes* was later followed by the Court of Appeals in *Greenland vs. Waddell*, 116 N. Y., 234. In that case the facts were, substantially, that a testatrix had bequeathed a fund to her executors after the death of B to apply so much of the income and interest thereof as should be necessary, to the maintenance and education of the children of B until the youngest of such children should attain the age of twenty-one, and then to pay and transfer the principal with its accumulations to such children, and "on the death of all said children before arriving at such age" to pay the fund over to a brother and sister of the testatrix. The Court held that the children of B would not take vested interests in the trust fund upon the death of B, with a postponement of possession merely, the gift over indicating that such could not have been the intention of the testator.

It is recognized, of course, that general rules of construction are not permitted to override, but must always be subordinated to the intention of a testator. But such rules are more than mere guides to the interpretation of instruments. Where in a long series of decisions similar forms of expression have been construed to indicate a certain purpose, they are to be regarded as expressing that purpose whenever they are used, unless there is something in the instrument inconsistent with it ; and especially is this so when they are used in an instrument prepared by a lawyer skilled in the drafting of such papers and familiar with the decided cases. The will of Mr. Vanderbilt obviously was so drawn. Moreover, it appears that the whole scheme of disposition of his residuary estate is consonant with the conclusion that he did not intend that any of his children should have an immediate vested interest in the principal of this property. He has carefully provided that none of his children or their next of kin shall receive any share of his residuary estate except upon certain conditions which are not consistent with a present vesting of the estate. Eliminating the gift of the income until Alfred G. Vander ilt attains the age of thirty years, the bequest to him of one-half of the residuary estate when he attains the age of thirty years and of the other half when he attains the age of thirty-five years would be contingent beyond the possibility of question. No other construction could be placed upon the language of the will. The contention that he has a present vested interest in this estate must, then, be rested entirely upon the fact that he is given the income of the trust fund until the time when, if he lives so long, he will become beneficially entitled to the estat This provision standing alone might denote an i tention on the part of the testator to give a vested remainder interest in the residue with a postponement of possession merely, but on the authority of the cases cited above the presumption of such an intention is rebutted

by the gift over in case Alfred G. Vanderbilt dies before he reaches the age of thirty or thirty-five.

Moreover, the intention of the testator not to give an absolutely vested interest in the residue to Alfred G. Vanderbilt may be demonstrated to a certainty without resort to the technical rule of construction above invoked.

By the "Personal Property Law" of the State of New York (Chapter 417 of the New York Laws of 1897 constituting Chapter 47 of the General Laws) it is provided in part as follows:

> § 3. * * * "Whenever a beneficiary in a trust for the receipt of the income of personal property is entitled to a remainder in the whole or a part of the principal fund so held in trust, subject to his beneficial estate for a life or lives, or a shorter term, he may release his interest in such income, and thereupon the estate of the trustee shall cease in that part of such principal fund to which such beneficiary has become entitled in remainder, and such trust estate merges in such remainder."

It is obvious that under the terms of the seventeenth clause of the will Alfred G. Vanderbilt would not be permitted to terminate the trust therein constituted, and nullify all the alternative provisions for the disposition of the property in case of his death under the age of thirty-five, by reducing the entire residue to immediate possession under the statutory provision above quoted, as he would be at liberty to do if his interest was an absolutely vested one; it must necessarily follow then that he has not an absolutely vested interest in such residue and that it could not have been the intention of the testator to give to him such an interest.

In the *Matter of Vanderbilt*, 172 N. Y., at page 72, HAIGHT, J., referring to the limitations in the seventeenth clause of Mr. Vanderbilt's will, said:

> "The estate created, therefore, is an estate in trust for the periods mentioned with a remainder vested in Alfred G., subject to be defeated by his death before arriving at the age of thirty or thirty-five."

This was but a passing remark of the learned Judge upon a question that was not involved in the case, as appears from the statement of the issues before the Court in that proceeding made in Point II. of this brief, and is contrary to the settled law of New York.

Smith vs. Edwards, 88 N. Y., 92.
Greenland vs. Waddell, 116 N. Y., 234.
Schlereth vs. Schlereth, 173 N. Y., 453.

Moreover this case is to be distinguished from Warner vs. Durant (*supra*), Matter of Seaman, 147 N. Y., 69, Campbell vs. Stokes, 142 N. Y., 23, and the other cases cited by the learned Judge in this connection. It was the evident intention of the testator in each of those cases, as shown by the internal evidence of the wills under consideration, that the interests there should be regarded as vested.

In Warner vs. Durant, after pointing out the fact that if the legacy in question was not vested it would fall into the residuum and ultimately take the same course as it would take if held to be vested, the Court said at page 141 :

> "It is not to be supposed that the testator, if he had the forecast to so frame his bequests as that these legacies should not vest, would have carelessly defeated his own purpose, by the residuary clause of his will."

In contrast to this situation it is shown above that in the present case the provisions of the seventeenth clause of the will absolutely negative any presumption that the testator could have intended Alfred G. Vanderbilt's interest in the residue to be an absolutely vested remainder.

In the Matter of Seaman (*supra*) the Court held that the interest under consideration was a vested interest and that the general rule applying to bequests of personalty that "where time is of the essence of the gift, and there is no present gift, nothing passes until the prescribed period arrives," did not apply because as stated at page 74:

> "Explicitly the will says, 'I give, devise and bequeath' the estates in remainder, and we are not compelled to resort to a direction to divide for an inference of an intention to give at all. I think the rule referred to has no application to a case like the present, where there are explicit words of gift beyond a direction to divide."

The present case is clearly distinguishable from that case on account of the absence here of any explicit words of gift. In the seventeenth clause the sole provision is for a future division of the residue and time is of the essence of the gift. The language of the will in the Matter of Seaman, as appears on page 72, was:

> "SIXTH. All the rest, residue and remainder * * * I give, devise and bequeath to my executors, * * * in trust to apply and pay over the income of one equal undivided half part thereof to my said adopted daughter * * * during her natural life, and upon her decease *I give, devise and bequeath* said equal undivided one-half part of my estate so held in trust * * * to the children of my nephew, * * * living at the time of her death, share and share alike."

In contrast to this provision the language of the seventeenth clause of the Vanderbilt will provides as follows:

> "All the rest, residue and remainder * * * I give, devise and bequeath to my executors * * *

> in trust * * * to pay the net income of said estate to him (Alfred G.) as received until he arrives at the age of thirty years *when he shall be put in full possession* of one-half of the portion of said estate to be set apart for that purpose by my executors, * * * And upon further trust thereafter to pay to my said son Alfred G. the income from the balance remaining of said estate until he shall arrive at the age of thirty-five years *when he shall be put in possession of the balance.*"

So also in Campbell vs. Stokes *(supra)*, in referring to the rule under consideration, the Court said at page 29 with respect to that case:

> "There is no room for the application of the technical rule sometimes resorted to, to ascertain whether an interest given by a will is vested or contingent, that where the gift is only found in the direction to divide at a future day, this circumstance may be considered and have weight. It is a rule for ascertaining the real intention of a testator and not for defeating it."

So in a case where the real intention of the testator can be ascertained without resorting to the technical rule referred to in the cases cited by the learned Judge there is no occasion for applying such rule, but if resort to it be had, it should be remembered that "it is a rule for ascertaining the real intention of the testator and not for defeating it."

But apart from the question of whether these interests are technically defined as "vested defeasible interests" or as "contingent interests" there can be absolutely no question that they are *future interests;* and this is a complete answer to the argument of counsel for the defendant that Alfred G. Vanderbilt has a *present vested interest* in the entire residuary estate. The legal title of the residue is and will remain in the trustees for such period of time as shall be

necessary for the execution of the trusts reposed in them. All the interests of Alfred G. Vanderbilt in the trust fund, his present right to the income excepted, are in the nature of remainders.

Stevenson vs. Lesley, 70 N. Y., 512.
Goebel vs. Wolf, 113 N. Y., 405.
Rudd vs. Cornell, 171 N. Y., 114.
Matter of Vanderbilt, 172 N. Y., 69.

These interests, being future and conditional, and likely to be defeated before they can vest in possession or enjoyment, no tax can be assessed or collected with respect to them under the War Revenue Law until they vest absolutely. Whether they are called contingent or vested, or by whatever name they are designated, the fact is that they are not rights of actual ownership and they have no clear value upon which a tax can be computed. They should therefore be treated in the same way that the remainder interests were treated in the case of *Knowlton vs. Moore, supra*, where, as appears from the schedule printed at page 44 of the opinion in that case, no tax was assessed with respect to such interests in the residue, pending the termination of the intervening interests therein.

POINT IV.

The present "clear value" of all Alfred G. Vanderbilt's interests in the residue, the enjoyment of two of which are conditional upon the beneficiary reaching the age of thirty years, and the enjoyment of one of which is conditional upon his reaching the age of thirty-five years, cannot now accurately be determined but obviously is not equal to the full cash value of the property comprising the entire residue.

It has been shown above that in order to properly assess the tax it is necessary to first determine the clear value of the beneficial interest taxed, for upon such clear value only can the tax be computed. This requirement of the law was entirely disregarded by the Court below, and although not disregarded by the Commissioner of Internal Revenue in originally assessing the tax an erroneous result was reached through the method followed by him in arriving at the value of the interest. As set forth in the statement of facts resort was had to the mortality tables, by which it was shown that Alfred Vanderbilt's expectation of life at his then age extended beyond the period during which he had a present interest in the income only, and reached into the time when, if he lived, he would take the residue itself; and the conclusion was drawn that this conditional future interest in the residue therefore merged with the present interest in the income and produced an absolutely vested interest presently taxable and equal in value to the entire residue. The application of such a construction as this amounts simply to an attempt at legislation by the Treasury Department. Mortality tables which are based on the average of all lives would thus be made to change the uncertainty of a single individual's continued ex-

istence for any definite period into a certainty that he will live the average age. This is going even beyond the power of an Act of Congress. Furthermore, the presumption that the average expectation of life of men in general at the age of twenty-two is fifteen or twenty years, is hardly enough to upset the well settled rules of law above applied to this case that the future interest in the residue, following a present interest in the income, coupled with a gift over in case of death intervening, is a contingent and not a vested interest. The expectancy under the mortality tables that Mr. Vanderbilt will outlive the age of thirty or thirty-five years, does not prove or even show presumptively that he will positively live for that period or any part of it, and does not, either in law or in fact, remove the absolute uncertainty as to whether or not he will live so long, nor change the contingency dependent upon his continued existence for ten or twelve years into an actuality. To put the proposition briefly: mortality tables are not to be used for the purpose of creating an interest, but only to aid in the determination of the present value of an interest already existing, the tax upon which must be paid before the interest can be enjoyed. Therefore, the Treasury Department erred in ruling that the probabilities shown by the mortality tables changed Mr. Vanderbilt's future interest in the residue and merged it with his present interest in the income thereof, and that the combined interests were presently taxable as a present vested interest in the entire residue equal to the full cash value thereof.

The Court below held that the tax was on the property passing and consequently that the computation was correctly made upon the full cash value of the property composing the residue. The error of the Court in sustaining the demurrer on any such ground has been elsewhere pointed out. The further error in sustaining the *amount* of the tax is at once evident when the tax is recognized as on an interest in property and not on the property itself. For it is the clear

value of the interest and not merely the value of the property that determines the amount of the tax, and the clear value of a postponed or conditional interest cannot be equivalent to the full cash value of the property out of which such interest arises, on which basis the tax in this case was assessed.

POINT V.

The War Revenue Law does not require the collection of a tax imposed thereunder until the beneficiary becomes entitled to the actual possession or enjoyment of the legacy.

It is evidently contemplated by the Act that the assessment and collection of a tax may be postponed until all questions of chance and doubt as to what interest should ultimately pay it are finally determined.

The provisions of the act as it stood at the time of the testator's death on September 12th, 1899, and also at the time of the assessment of the tax herein, so far as they related to the time of payment of the tax were as follows :

> "SEC. 30. That the tax or duty aforesaid shall be a lien and charge upon the property of every person who may die as aforesaid for twenty years, or until the same shall, within that period, be fully paid to and discharged by the United States ; and every executor, administrator or trustee before payment and distribution to the legatees, or any parties entitled to beneficial interest therein, shall pay to the collector or deputy collector of the district of which the deceased person was a resident the amount of the duty or tax assessed

upon such legacy or distributive share, * * *. And in case such executor, administrator or trustee shall refuse or neglect to pay the aforesaid duty or tax to the collector or deputy collector, as aforesaid, within the time hereinbefore provided," etc.

Thus the provisions with respect to the collection of taxes were merely that they should be paid before payment and distribution of legacies to the legatees. This was the only limitation fixed for the payment. The twenty-year period during which the tax is made a lien only begins to run, as held in *Mason vs. Sargent*, 104 U. S., 689, at 692, under the Act of 1864, from the date when the tax accrues, which in this case is not until the future interests become perfected in possession or enjoyment.

Any other construction would be inconsistent with the other provisions of the act and the general character of the tax, because, as herein above shown, the tax on each interest is collectible not out of the estate generally, but only out of the property passing under each separate legacy. Therefore, until each interest becomes perfected and the time arrives for the actual possession or enjoyment of the property out of which the legacy arises, a tax collected with respect to such interest would have to be deducted from some legacy or distributive share other than the particular one with respect to which it was charged; for, until the time of possession or enjoyment actually arrives, there is no property out of which the tax can be paid without interference with and injury to some other interest. The importance of these consequences is particularly to be considered in connection with future and conditional interests such as those presented in the present case. We are not left in doubt, however, as to what construction Congress intended to have put upon the provisions for the collection of such taxes, for Congress has in effect declared the meaning of the Act to be as above stated in passing the amendment taking effect

July 1st, 1901. This amendment added among other things the following provisions to Section 30:

> "Any tax paid under the provisions of Sections 29 and 30 shall be deducted from the particular legacy or distributive share on account of which the same is charged".

At the same time that the amendment just quoted was made there was also added to Section 30 of the Act another amendment providing that the tax *imposed by Section 29* should be due and payable in a year after the death of the testator or intestate. This provision referred, of course, only to taxes properly assessed and so has no bearing upon conditional or future interests such as taxed in this case, because, as elsewhere shown, such interests not having a present clear value the assessment on them could not be properly computed until the time for the actual possession or enjoyment of the interest arrived. Any other construction, as shown above, is inconsistent with the theory of the tax which the Supreme Court found necessary to adopt in order to sustain the Act. So far as the tax on such interests is concerned therefore, its collection is controlled by the provision of the Act that it must be paid out of the legacy on account of which it is charged, and there is no way of complying with this requirement before the time of distribution arrives.

Under such amendment, therefore, the Collector was not authorized to collect the tax out of any other interest than the one with respect to which the tax was assessed, and inasmuch as it has been shown above that the interest upon which the tax in this case was assessed was not a present absolutely vested interest but included future and conditional or defeasible interests under which the possession and enjoyment of the legacy was postponed, the tax in this case could not possibly have been collected in accordance with the Act, out of the particular legacy with respect to

which it was assessed. On the contrary, in violation of this provision, a payment was compelled before such future and conditional interests had become perfected and out of property held for the benefit of entirely different and separate interests.

This question has already arisen and been passed upon in Rhode Island in the case of *Fitzgerald vs. Rhode Island Hospital Trust Co.*, 52 Atl. Rep., 814.

The facts in that case were that two estates were carved out of the same property, which was given to the trustees to pay the income to A for life, with a remainder to B. It was there held that neither the tax imposed upon the estate for life nor the tax imposed upon the remainder could be paid out of the trust fund but the tax upon the life estate must be paid out of the life tenant's income, and the tax on the remainder must be postponed until some property passed to the remainderman out of which payment could be made. If the tax upon the first estate should be paid out of the principal of the trust fund the burden of the tax with respect to that interest would not fall upon the recipient of the legacy taxed but upon the remainderman. So, if the tax upon the remainderman's beneficial interest should be paid out of the trust fund, then, to the extent that the income of the estate for years was reduced thereby, the first tenant would be forced to bear the burden of the tax upon the interest of the remainderman. That is the effect produced by the collection of the tax on the future interests of Alfred G. Vanderbilt in the residue of his father's estate. Under such circumstances, there is no alternative but to postpone payment of the tax on the estate in remainder until the termination of the precedent estate when it can be paid without diminishing the interest of the first tenant.

Furthermore, in the case at bar Reginald C. Vanderbilt and his sisters named in the 17th clause of the will, have a right to insist that there shall not be paid prematurely out of the property in which they have a contingent interest and which may

ultimately become the absolute property of one or more of them, a tax upon a future interest or interests of their brother therein; they have a right to insist that the principal of this trust fund shall be kept intact until the beneficial ownership thereof is definitely determined, and if the trustees should have voluntarily paid a tax upon Alfred G. Vanderbilt's contingent interests in this property and deducted the tax so paid therefrom they could no doubt be held accountable for the amount thereof, in the event that Alfred G. Vanderbilt should die prior to the vesting of his future interests in possession or enjoyment.

Fitzgerald vs. Rhode Island Hospital Trust Co. (supra).

Moreover, the executors have now been forced to pay a tax upon Alfred G. Vanderbilt's interest in the residue as if he was absolutely in possession of the whole of it at its present full value. But if he should die, as might happen, before actually receiving the property not only would his income during his life have been diminished by the amount of the interest on the tax paid out of the residue, but also a tax would have been exacted on an interest in property which he had never received, which interest would have thus been proved not to have had the value at which it was assessed, but to have had no value whatever beyond the interest in the income of the residue upon which he admits that a tax should be paid as has been done. Thus our contention would be proved in showing that it is impossible to ascertain now the clear value of the interest in the residue, and that such interest has no value until the residue actually comes into possession.

Furthermore, consider the practical application to this case of the requirements of the Act as above interpreted that the tax be assessed with respect to each legacy separately and be paid out of the legacy. The only feature of the legacy to Alfred G. Vanderbilt which he is at present enjoying and is at present sure

of, is the interest in the income of the residue. The tax on the interests in the residue itself which has been exacted has been paid out of the residue; it has therefore diminished the income of the residue by the amount of the interest on the tax—in other words, the tax on the interest in one legacy, *i. e.*, the principal of the residue, has been paid at the expense of the interest in another legacy, *i. e.*, the income in the residue.

If, on the other hand, the act be so construed as to postpone the imposition and collection of the tax until all questions of chance and doubt as to what interests should ultimately pay it are disposed of, the difficulties above pointed out will be avoided and the administrative provisions of the act will be found to be in accord and harmony with the theory of the character and subject matter of the tax already adopted by this Court.

POINT VI.

The answers proposed on behalf of the plaintiffs to the questions submitted.

In view of the foregoing considerations it is respectfully submitted that the four questions herein certified to this Court should be answered as follows:

Question I, in the negative.

Question II, in the affirmative.

Question III, in the negative.

Question IV, in the negative.

Respectfully submitted,

HOWARD TAYLOR,
HENRY B. ANDERSON,
CHANDLER P. ANDERSON,
For Plaintiffs in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1904.

WILLIAM K. VANDERBILT ET AL., as Executors, etc., Plaintiffs in error, vs. FERDINAND EIDMAN, as United States Collector of Internal Revenue, Defendant in error.	No. 206.

WASHINGTON, D. C.,
October 13, 1904.

Argument of Howard Taylor, of Counsel for the Plaintiffs in Error.

MR. TAYLOR: This case, if it please the Court, comes before you on several questions certified from the Circuit Court of Appeals for the Second Circuit.

Without for the moment detailing them, I would say that in general it involves the construction of the War Revenue Act of 1898 in relation to future or remainder estates, the question of *how* and *when* such estates shall be taxed, whether the tax in all instances of future estates is to be imposed and collected immediately upon the probate of the will, or whether that shall be postponed until the time

comes for either the vesting of the estate or the coming of the beneficiary of the estate into the possession and enjoyment of the same.

The Facts.

Cornelius Vanderbilt, whose executors I represent and who are the plaintiffs in this suit, died in 1899. That was the year after the War Revenue Act was passed, and before it had been either amended in any way or repealed. He left a residuary estate, the personalty of which was about $19,000,000; and it is this residuary estate with which these questions are concerned.

The sole clause in his will which relates to his residuary estate is set forth on the second page of this small record. Briefly it bequeathes and devises the same as follows:

The estate is tied up in trust. All the income from this trust is to go to his son Alfred Vanderbilt until he shall have arrived at the age of thirty. If he is living at that time Alfred is to be put into possession of half of the principal of the estate, and the balance is to be held in the same trust, the income to be received by him until he shall have attained the age of thirty-five. If and when he shall have attained the age of thirty-five he is to be put in possession of the whole of the principal of the estate. If, prior to the time he is to be put into possession of any part of the principal of the estate, (that is, at the age of thirty as to half, or at thirty-five as to the whole), he dies, leaving children, and those children survive to a majority, the children are to have the estate out and out. If, however, he dies without children, or if the children do not survive to a majority, then the estate goes to his brother, Reginald Vanderbilt, in precisely the same manner; that is to say, when and if Reginald shall have arrived at the age of thirty he will receive half of the principal, meanwhile receiving all of the income, and,

when and if he shall have arrived at the age of thirty-five, he will receive the balance of the principal. Assuming that Reginald dies during the trust period without any issue, then the estate is to go to the two daughters, Gertrude and Gladys, and, if either of them dies before these sons, to their issue, if they have any; otherwise the survivor to take the whole.

Your Honors will observe that in case the two girls shall have died before the boys, and then the boys shall have died before they reach the age of thirty, there is a possibility of a partial intestacy under this will. The estate will then go direct from Cornelius Vanderbilt, by intestacy, to his widow and next of kin. As a matter of fact there is a widow, and as a matter of fact there is another child, young Cornelius Vanderbilt.

The point to which I wish to draw your attention in the recital of these facts is that up to the time that Alfred Vanderbilt becomes thirty years of age, speaking as to half, or up to the time he becomes thirty-five, speaking as to the entire amount, there is no particular person who either has the right to enjoy the principal, or who, upon dying, has the right to dispose of that principal. Your Honors will follow that from my statement of the case, and from the will itself as you see it there.

Mr. Justice Holmes: Will you state that last proposition again?

Mr. Taylor: Until Alfred Vanderbilt reaches the age of thirty he has no sure right to the principal or the right to dispose of the principal by will either to his legatees or to his creditors in case he should have any. That is to say—and it goes through this entire clause—there is no particular human being today who can dispose of this remainder interest.

Mr. Justice Holmes: There is a possibility of an intestacy as to that sum still, is there not?

Mr. Taylor: I think there is; there is a possibility of an intestacy in case the two girls die before the two boys without issue and then the two boys after-

wards die before they are thirty. In that case there would be the possibility of intestacy.

MR. JUSTICE WHITE: Before they are thirty-five?

MR. TAYLOR: Half as to thirty and the full amount as to thirty-five; and in the event of intestacy of course under our statutes, it would go to the widow and next of kin, one-third to the widow and two-thirds to the next of kin. The next of kin in that instance would be this other son, who is not mentioned in the residuary clause.

MR. JUSTICE WHITE: Pardon me for troubling you right there. Let us presume that that contingency had occurred. Would there have been a different rate of tax?

MR. TAYLOR: In the intestacy?

MR. JUSTICE WHITE: Yes.

MR. TAYLOR: Yes, sir. Of course to the widow there would have been an exemption.

Although in response to Mr. Justice HOLMES I stated that I believed there was a possibility of intestacy under this will, that is not the point to which, entirely, I wish to draw your attention. The main point is that Alfred Vanderbilt, whose interest has been here assessed, as I shall shortly show to your Honors, himself certainly has no right to this principal until he is thirty, and is unable to dispose of it by will or otherwise until he shall have arrived at that age.

We paid a tax of $115,000 out of the income of Alfred Vanderbilt, being 2¼ per cent. on the amount computed by the mortality tables that he was expected to enjoy of this income from the time he succeeded to it at the age of twenty-two, until he should have reached the age of thirty. Having paid that tax, the Collector asserted that we should pay in all a tax of $426,872.64, upon this theory: $426,872.64 was 2¼ per cent of $19,000,000, the entire residuary personal estate. He said: "Under the mortality tables the chances are that Alfred Vanderbilt will live 33 years. 33 years plus 22 years"—which he was at that time—"is more than 35

years; and therefore, because the chances are that he will live to be 35, I say that Alfred Vanderbilt must pay the tax on this entire $19,000,000 which he will receive when he comes to be 35." "But," he said, "you have already paid a tax of $115,000 out of that, and therefore I give you credit for that amount."

We consequently paid, under threat of distraint and sale, the balance demanded by him, namely, the difference between the $426,872.64 and the $115,000, that is $311,000. We appealed from that decision as to the $311,000 to the Commissioner of Internal Revenue, and he affirmed the decision of the Collector. We then brought this suit, setting forth the facts as I have stated them. The facts were demurred to, and it came up for argument before District Judge WHEELER. He did not adopt the theory of the Collector, but nevertheless defeated us, upon the theory that the tax should be payable upon the passing of the estate from the deceased to the trustees; that is to say, that a tax of $426,000 should be levied as a whole upon this residuary personal estate because it had passed from the executors to themselves as trustees. He disregarded the question of the beneficial interest, saying in a passing remark, which may be right or may not be right, "The beneficiaries of this trust, whoever they may be in the future, are in the same class, and therefore would pay the same tax." The theory upon which he decided was that the tax was due upon this transfer from these people as executors to themselves as trustees.

MR. JUSTICE PECKHAM: Have you the statute there before you?

MR. TAYLOR: Yes, sir. I will read it in a moment.

The Circuit Court of Appeals, on our writ of error, has placed the matter before you, and has certified these various questions. I believe that was by the request of the District Attorney below. Coming here, the Assistant Attorney General takes still a third position. That is, he makes this entire question depend upon whether, technically, the interest of Alfred Vanderbilt

was a vested or a contingent remainder, according to our statutory construction of what is a vested and what is a contingent remainder in the State of New York.

The Argument.

Before stating my own legal propositions upon this subject, I desire to read to your Honors from the statute itself. It is set forth quite fully at page 10 of our brief, but I shall read from the full statute. I have here the Statutes at Large. It is to be found at page 464, if your Honors would prefer to read from that in full. It is also quoted in full in the case of *Knowlton* vs. *Moore*, to which I shall come in a moment. It is as follows:

"That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of $10,000 in actual value, passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory, or any personal property or interest therein, transferred by deed, grant, bargain, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer, to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, shall be, and hereby are, made subject to a duty or tax, to be paid to the United States as follows."

That is as far as I desire to go for the moment. At page 65 of the case of *Knowlton* vs. *Moore*, in 178 U. S., his Honor, Justice WHITE, has well said that the opening words of Section 29 may, for clearness, be thus arranged:

"That any person or persons having in charge or trust, as administrators, executors or trustees, any legacies or distributive shares arising from personal property, * * * passing, after the passage of this

act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory, * * * shall be, and hereby are, made subject to a duty or tax, to be paid to the United States, as follows:"

We find thus far that the *hand* that is to pay the tax is the executor or the administrator or the trustee.

It then proceeds:

"That is to say: Where the whole amount of said personal property shall exceed in value ten thousand, and shall not exceed in value the sum of twenty-five thousand dollars, the tax shall be:

"FIRST. Where the person or persons entitled to any *beneficial interest* in such property shall be the lineal issue or lineal ancestor, brother, or sister to the person who died possessed of such property, as aforesaid, at the rate of seventy-five cents for each and every hundred dollars of the *clear value of such interest* in such property."

I will read that again, if I may:

"Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor, brother, or sister to the person who died possessed of such property, as aforesaid, at the rate of seventy-five cents for each and every hundred dollars of the clear value of such interest in such property."

Then there are provisions for a higher rate in case of remoter degrees of relationship.

It proceeds:

"Provided, that all legacies or property passing by will, or by the laws of any State or Territory, to husband or wife of the person died possessed as aforesaid, shall be exempt from tax or duty."

Then follow the provisions for the doubling and trebling of the amount in case of large legacies, ending with the words:

"And where the amount or value of said property shall exceed the sum of one million dollars, such rates of duty shall be multiplied by three."

As Alfred Vanderbilt's income up to thirty will exceed the million dollar rate, we paid at that rate of 2-1/4 per cent, that is, three times seventy-five cents per one hundred dollars.

Section 30 is as follows:

"That the tax or duty aforesaid shall be a lien and charge upon the property of every person who may die as aforesaid for twenty years, or until the same shall, within that period, be fully paid to and discharged by the United States; and every executor, administrator, or trustee, *before payment and distribution to the legatees*, or any parties entitled to beneficial interest therein, shall pay, to the collector or deputy collector of the district of which the deceased person was a resident, the amount of the duty or tax assessed upon such legacy or distributive share, and shall also make and render to the said collector or deputy collector a schedule, list, or statement, in duplicate, of the amount of such legacy or distributive share, together with the amount of duty which has accrued or shall accrue, thereon, verified by his oath or affirmation, to be administered and certified thereon by some magistrate or officer having lawful power to administer such oaths, in such form and manner as may be prescribed by the Commissioner of Internal Revenue, which schedule, list, or statement shall contain the names of each and every person entitled to any *beneficial interest* therein, together *with the clear value of such interest*, the duplicate of which schedule, list, or statement shall be by him immediately delivered, and the tax *thereon* paid to such collector; and upon such payment and delivery of such schedule, list, or statement said collector or deputy collector shall grant to such person paying such duty or tax a receipt or receipts for the same in duplicate, which shall be prepared as hereinafter provided. Such receipt or receipts, duly signed and delivered by such collector or deputy collector, shall be sufficient evidence to entitle such executor, administrator, or trustee to be credited and allowed such payment by every tribunal which, by laws of any State or

Territory, is, or may be, empowered to decide upon and settle the accounts of executors and administrators. And in case such executor, administrator, or trustee shall refuse or neglect to pay the aforesaid duty or tax to the collector, or deputy collector, as aforesaid, within the time hereinbefore provided, or shall neglect or refuse to deliver to said collector or deputy collector the duplicate of the schedule, list, or statement of such legacies, property, or personal estate, under oath, as aforesaid, or shall neglect or refuse to deliver the schedule, list, or statement of such legacies, property, or personal estate, under oath, as aforesaid, or shall deliver to said collector or deputy collector a false schedule or statement of such legacies, property, or personal estate, or give the names and relationship of the persons entitled to beneficial interests therein untruly, or shall not truly and correctly set forth and state therein the *clear value of such beneficial interest*, or where no administration upon such property or personal estate shall have been granted or allowed under existing laws, the collector or deputy collector shall make out such lists and valuation as in other cases of neglect or refusal, and shall assess the duty *thereon.* * * * *."

If it please the court, now upon reading that extract from the statute, practically the full statute so far as it is material to either side of this case, I will state my position.

First, the tax is measured by the clear value of each beneficial interest, and though the executor or trustee may be the hand that pays it, the payment is to lessen *pro tanto* the respective beneficial interest against which it is assessed. I claim, if it please the Court, that that has already been decided by the case of *Knowlton* vs. *Moore*, to which I shall refer in a moment.

Second, that being so, that this is a tax against the beneficial interest, the tax must be intended in all cases to be imposed at a time coincident with the time for payment of the interest to the party beneficially

entitled. The tax must be imposed and collected at a time coincident with the time when the party beneficially entitled to that interest shall come into possession and enjoyment of the same. It is a tax against the actual receipt by him of that interest, and should be paid out of that interest, and immediately before payment thereof to the beneficiary.

Your Honors will at once see that, taking that position requires me to sustain the position, which I shall seek to do, that in the simplest case of no trust at all, a life estate to Smith with remainder to Jones, the tax on the remainder interest should not be paid until it comes into possession; that is, until the death of the life tenant. I do take that position and I believe I can sustain that position. I take it because it is the logical position from the entire meaning of the act. But—it is a much more advanced position than there is any occasion for my taking by reason of the particular facts in this case, because the position which the facts in this case lead to, is this and only this:

THIRD, the tax is measured in regard to each legacy by the *clear* beneficial interest of that particular legatee, standing, as he does, in some one of the stated relationships to the testator mentioned in the act. It is, in effect, imposed upon the legatee. Therefore, without regard to any technical rules as to vested or contingent, present or future, interests, no legacy of a remainder interest has a *clear* value within the meaning of this act unless the remainderman is either sure some day to receive it himself or, if he dies before the life estate is determined, can leave it to his heirs or to his legatees or to his creditors. When you consider that this is a tax upon *this* legatee, the tax of the remainder here is for the present merely a tax upon what is nothing more nor less than a gamble; because it is in this instance purely a gamble whether Alfred Vanderbilt comes to the age of thirty or not, and if Alfred Vanderbilt is now taxed, as he has been today, upon this remainder in-

terest, he is taxed upon something which he may never receive. The fact that the chances are that he will receive it is no more than that the gamble is favorable to him. The act never intended to tax any such gamble as that. It is not a clear interest.

MR. JUSTICE BROWN: Does it make any difference in your view of the case that upon the death of Alfred Vanderbilt his brother Reginald is substituted for him, and upon the death of Reginald his sisters are substituted for him, all of whom are lineal descendants of Cornelius Vanderbilt? Would that make a different case from a case where if Alfred died it would go out of the family or to some other person at a different rate?

MR. TAYLOR: No, sir, because the tax comes upon each legatee and is taken out, and according to the rationale of the act is to be taken out, of each legatee's interest. This particular tax has been taken out of Alfred Vanderbilt's interest. Alfred Vanderbilt may never enjoy the principal, and yet he is enjoying that much less income right along by reason of the abstraction of this $311,000 tax out of the principal from which he receives his income.

MR. JUSTICE HOLMES: I had the same point in my mind when I addressed the question to you about possible intestacy. Suppose this matter were arranged in such way that there could not be a possible intestacy and that the remainder must be enjoyed by somebody standing in exactly the same degree, so that there was no possible question. It would seem to me to be a very refined and speculative point to say that this tax is a tax on the persons as distinguished from the fund, in such a sense that inasmuch as you now have a remainder in existence, with an absolute certainty that one of a certain class shall have it, and that whoever has it, the same deduction from the same fund shall take place, nevertheless the deduction cannot take place until the person has been identified. That is your proposition, and it is a little refined and metaphysical.

MR. TAYLOR: I must differ from your Honor that it is metaphysical. It is real and substantial when you consider that Alfred Vanderbilt, during all this time, is receiving an income out of principal diminished by this $311,000, which the Government has taken, when he may never receive that principal at all.

MR. JUSTICE HOLMES: You say, then, that, supposing he should die before the time of paying over, that event would show that during the whole intervening period up to the time of his death, he was entitled to the income of the whole fund; that it never would have been subject to the tax on principal; that the next man must undergo the diminution.

MR. TAYLOR: The next man must undergo the diminution.

MR. JUSTICE HOLMES: I did not quite understand the point.

MR. TAYLOR: I follow your Honor; but the point is that the act clearly imposes taxes on different particular legatees, and now Alfred Vanderbilt has paid a tax on principal which may go to somebody else.

MR. JUSTICE BROWN: To somebody standing in the same relation to Cornelius Vanderbilt that he does. If it went out of the family, to sombody else, it would pay an increased tax.

MR. TAYLOR: It would pay an increased tax. If it went to the widow it would pay a diminished tax. But even assuming that they were all of the same relationship, that there was nobody to pay a less tax, or nobody to pay more of a tax, nevertheless it will be Alfred Vanderbilt paying somebody else's tax on principal which he may never enjoy himself and which he has no present capacity to pass by will himself either to his creditors or to his legatees. Just as soon as I can persuade your Honors that this tax is upon each legatee, it necessarily follows, as a conclusion, that that is not a just or proper thing to do.

MR. JUSTICE WHITE: In other words, your argument is that the first person who takes the beneficial interest, if he pays the whole tax, which is presumed to

be deducted from the principal, would be getting less revenue during his whole life if he did not reach the age stated, than he would have received if he had only paid his proportion of the tax?

MR. TAYLOR: Yes, sir; and when your Honors come to consider that Alfred Vanderbilt, as he has, pays this $115,000 out of his income, not out of the principal, then you see the injustice of not only taking that out of his income, but also of taking out of the principal from which he gets his income this additional $311,000.

MR. JUSTICE WHITE: I do not like to break the thread of your argument, but are there any authorities under the previous war revenue act?

MR. TAYLOR: The authorities under the previous war revenue act are entirely in my favor even upon my most advanced propositions; but to be fair with your Honor, the wording of the statute has changed. So far as the United States authorities are concerned, they are in my favor. The change in the wording of the statute I do not believe to be material.

MR. JUSTICE BROWN: Are there any authorities under the New York State inheritance law upon this subject?

MR. TAYLOR: The authorities under the New York inheritance law are in my favor, not so far as my most advanced proposition is concerned, but they are in my favor on the proposition that as Alfred Vanderbilt is not yet surely entitled to the principal, he should not be obliged to pay the amount on that now, even though technically his legacy might be considered a vested remainder. Those are the New York authorities, and they were the cause of the recent change in the New York Statute, to which I shall refer in a moment.

I am very glad to have your Honors ask these questions, although it has thrown me a little bit out of the argument, because you show in detail the positions I am trying to sustain.

FOURTH, the concession of the Attorney-General is that technical contingent remainders are not taxable and they are surely not taxable, because a statute was

passed by Congress in 1902, stating they are not taxable. I contend that the remainder interests of Alfred Vanderbilt and all of the others under this will are technical contingent remainders, even under our very abstruse rule in New York, and that therefore, upon the concession of the Attorney-General, we would be entitled to succeed here.

The Argument in Detail.

I come first to the question of what, thus far, has been decided.

In the case of *Knowlton* vs. *Moore* these propositions were settled: In the first place, that this was a legacy tax as distinct from a probate tax. I mean by that, that this is not a tax upon the interest of Cornelius Vanderbilt, the testator, that ceased, but is a tax upon each legacy, as it goes to the legatee. Second, that led necessarily to the conclusion, in *Knowlton* vs. *Moore*, that the amount of the tax was proportioned, not to the entire value of the estate, but to the value of each and every particular legacy, and that it varied according to the amount of that particular legacy rather than according to the amount of the estate. These two propositions my opponent will admit.

I contend further that *Knowlton* vs. *Moore* has decided that "a legacy" defined in the act, meant not the *property* that was mentioned in the legacy, going down through the various trusts, life estates, estates for years, and remainders; but meant the beneficial interest which each legatee received under the will; that it was not the property, but it was the beneficial interest therein which was to be taxed, under the act. To demonstrate this:

At page 64 of the opinion in that case, the third possible alternative construction of the act is stated, and it is the alternative which the court adopted, namely:

"The tax is on the passing of legacies or distributive shares of personalty"—

"Distributive shares", I take it, applies to intestacy, as "legacy" does to a case of testacy—

"with a progressive rate on each, separately determined by the sum of each of such legacies or distributive shares."

That was said after commencing the opinion in the case by setting forth the schedule which your Honors will find at page 44. In this schedule, under the heading "Clear value of legacy" there is set forth not the total of the property, but the sum denoting the interest of each particular legatee in that property. In that case, as in this, there was a question of a life estate in trust, and after that a remainder. The legacy mentioned was not the total residuary estate, but a life tenant's interest, and then a number of remaindermen interests, making the total the entire amount of the residuary estate. I contend that the entire discussion of the court in *Knowlton* vs. *Moore*, and all that is said in regard to legacies, after setting forth this schedule, must be read in the view that "legacy" means the interest of each legatee, rather than the total property bequeathed.

When that case was reversed and sent back for readjustment upon the basis of the decision of this Court, there was no criticism made by anybody upon the method that the appraiser had adopted from the beginning, of calling a "legacy" not the property, but the particular beneficial interest which each legatee had.

At page 60 the court said:

"Certainly, a tax placed upon an inheritance or legacy diminishes, to the extent of the tax, the value of the right to inherit or receive, but this is a burden cast upon the *recipient* and not upon the power of the State to regulate."

At page 66 the Court said:

"One of two things must arise. When the rate of tax is thus calculated upon the particular attitude to the deceased of each of the legatees or distributees, the

sum of the tax must be deducted either from each particular legacy or from the mass of the whole personal estate. If it is deducted from each particular legacy, then it is manifest that the tax imposed will have been levied, not upon the mass of the estate, but upon each particular *legatee* or *beneficiary*, since the share of such person will have paid a rate of taxation predicated upon the amount of the legacy and the relationship, or want of relationship, of the particular recipient thereof to the deceased."

At page 80, quoting from that part of the opinion in *Pollock* vs. *Farmers Loan and Trust Co.* which discusses the case of *Scholey* vs. *Rew*, Mr. Justice WHITE takes occasion to say:

"'The opinion stated that the act of Parliament, from which the particular provision under consideration was borrowed, had received substantially the same construction, and cases under that act hold that a succession duty is not a tax upon income or upon property, but *on the actual benefit derived by the individual*, determined as prescribed.'"

I claim, therefore, that it has been already decided by this court, in the case of *Knowlton* vs. *Moore*, that "legacy" means not property but the beneficial interest of the legatee. I am not sure that my opponent will dispute that proposition. It does not undermine the view of the Collector of Internal Revenue in assessing this tax; but it does undermine the view taken by his Honor, Judge WHEELER, and the view since taken by District Judge MCPHERSON and District Judge PLATT, to the same effect. The logic of their decisions is that every estate in remainder, whether it be vested or contingent, would be presently taxable immediately upon the probate of the will, except for the clause of the later act relating to contingent remainders; and they base that ruling, when it comes down to the last analysis, upon these four words "in trust or otherwise", which immediately precede the words "shall be and hereby are made subject to a duty or tax,".

I must pause to consider that for a moment, because that really is the basis of the decision against us by Judge WHEELER, in the court below. These words "in trust or otherwise", immediately follow the words "body or bodies, politic or corporate." We take the position that the words "in trust or otherwise" apply to the words "politic or corporate", and do not apply to the prime clause of the act, beginning "any person or persons having in charge or trust, as administrators, executors, or trustees"— If these words "in trust or otherwise" do not apply to the words "body or bodies, politic or corporate", then they apply to the second alternative mentioned in the statute, "any personal property or interest therein, transferred by deed, grant, bargain, sale, or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainer, to any person or persons, or to any body or bodies, politic or corporate."

Judge WHEELER, in the court below, made those words apply to the very first part of the act, and he said that applying them in that way this was a case which was precisely within the terms of the act. He read it as follows:

"Any person * * having in charge or trust, as * * * trustee, any legacies * * * * * * passing, * * * from any person * * * * to any person, * * * in trust or otherwise."

To give his significance to the words "in trust or otherwise" Judge WHEELER jumps over the heads of two other clauses which are nearer to those words, and to which they could refer, and makes of them an entirely redundant use.

MR. JUSTICE HOLMES: Will you state that once more? I have the whole sentence now before my eyes, and I should like to hear Judge WHEELER's interpretation of it.

MR. TAYLOR: Judge WHEELER's interpretation is that the words "in trust or otherwise", which immediately precede the words "shall be, and hereby are, made

subject to a duty or tax,"—go over the head of the phrase "body or bodies, politic or corporate", which immediately precede them; that they go over the head of the phrase relating to gifts *inter vivos* intended to take effect after death, and go back to the very first words of the act, and refer to "any person or persons having in charge or trust, as administrators, &c." He argues therefore that the meaning of the act must be that as the property passes *into* a trust the tax becomes immediately assessable as a whole on the entire value.

The answer to that is three-fold: In the first place, it is against the decision in the case of *Knowlton* vs. *Moore*. In the second place, those words "in trust or otherwise," construed as Judge WHEELER construes them, are redundant because then you have it "any person or persons, having in * * trust, as * * trustees, any legacies * * * * * in trust or otherwise." That redundancy is eliminated if you give to those words "in trust or otherwise" the function of applying to the words *immediately* preceding them.

MR. JUSTICE BROWN: Is Judge WHEELER'S opinion printed in full?

MR. TAYLOR: It is printed in our brief at page 7.

THIRD, if there is any ambiguity as to what those words "in trust or otherwise" really apply to, we come back to that clause of the act, which is the clause upon which we stand, showing what is to be taxed, namely, "Where the person or persons entitled to any beneficial interest in such property shall be the lineal issue or lineal ancestor, brother, or sister to the person who died possessed of such property, as aforesaid, at the rate of seventy-five cents for each and every hundred dollars of the clear value of such interest in such property."

MR. JUSTICE HOLMES: Following the question of the construction—do the words "any person or persons" in that part of the act—you have that?

MR. TAYLOR: Yes, sir.

MR. JUSTICE HOLMES: Are they not governed by the word "passing," a little further back—"passing, after the passage of this act"?

MR. TAYLOR: Not according to the decision in the case of *Knowlton* vs. *Moore*, because at page 65 of the decision in that case, it is said by the Court:

"The opening words of Section 29 may, for clearness, be thus arranged:

"That any person or persons having in charge or trust, as administrators, executors or trustees, any legacies or distributive shares arising from personal property, * * * passing, after the passage of this act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory, * * * shall be, and hereby are, made subject to a duty or tax to be paid to the United States, as follows:"

"Thus collocated, the statute clearly imposes the duty on the particular legacies or distributive shares, and not on the whole personal estate. It does not say that the tax is levied on the personal estate left by the deceased person, but it is imposed on legacies or distributive shares arising from such property. This is made clearer by considering that in the very same section the tax is described as being upon 'any interest which may have been transferred by deed, grant, bargain, sale or gift, made or intended to take effect in possession or enjoyment after the death of the grantor or bargainor, *to any person or persons*" etc.

That is repeated on page 73, and is even more emphatically stated on pages 74, 75, showing that the construction which this Court gave is that the word "to" refers to gifts *inter vivos*, and not back to the word "passing."

But whether it does or not, the words "in trust or otherwise" have their function and fulfill it by referring to the words "body or bodies, politic or corporate" immediately preceding them.

If your Honors have followed me thus far, there is this logical conclusion to be drawn from the argument I have made, that the legacy tax is not only chargeable against a particular legatee but must be paid by the particular legatee's interest. If that be so, and this is what I call my advanced position, it is impossible to pay the tax out of the remainder interest until that remainder interest is about to go into possession and enjoyment, because until that time comes it must otherwise come out of the life tenant.

I have an authority on this particular and present Federal tax act which I have cited in my brief (pp. 32, 80). It is a case which came up in the State Court of Rhode Island, between a trustee and a life tenant, and it was held that that must be the meaning of the act, because the courts have held that each particular legatee was to bear the burden, that the life tenant was to bear the burden out of the income, and the remaindermen should bear the burden out of the remainder.

The Attorney-General, in his brief, says that Alfred Vanderbilt is taking a risk in paying this tax upon the income, because he is not yet thirty years of age; that he may die at 23, and then he will have paid a tax of $115,000, when the tax upon his income for one year would have been less. The answer to that is that Alfred Vanderbilt is taking that risk; but the tax is being taken out of what Alfred Vanderbilt *is receiving*. He has received more than that amount of income, and the tax would be taken out of his income. But when it comes to paying a tax upon the remainder *now*, it is taking the tax out of the principal he has not yet received, which he cannot dispose of, which he may never receive, and which he may never be able to dispose of.

This position, as I think I answered in reply to his Honor, Justice BROWN, is a little in advance of the position taken by some of the State cases.

In the State of New York, take the ordinary case of no trust at all, no possibility of defeasance, no contingent remainder—the ordinary case of a life estate to Smith

with remainder to Jones: they take the whole tax at once. But they do that, in the State courts, upon the theory that it is a tax upon the person, and that if the life tenant has any objection to this tax being taken out of the total, then they can collect it personally from the remainderman himself; that the fact that the remainderman indicates his acceptance of this legacy to him in remainder, gives the right to the State of New York to go against his other property, entirely independent of that which he receives under the will.

MR. JUSTICE BROWN: Suppose Alfred Vanderbilt should die before he became thirty years of age. This property would pass to his brother Reginald; would it not?

MR. TAYLOR: Yes sir; depending upon whether Alfred had children and depending further upon whether those children reached their majority.

MR. JUSTICE BROWN: Assume that he had no children. Would it pass to Reginald subject to a new inheritance tax? What is your position on that question?

MR. TAYLOR: My position is that there would be only the one inheritance tax, and it would not be imposed until the legatee came into possession or enjoyment; then it would be imposed according to the degree of relationship of the person who actually took that interest. There would be but one inheritance tax for each legacy, and it would be paid as soon as the particular individual came into the enjoyment of it, according to the rate that was prescribed for him to pay under the statute. It might be the same rate as Alfred's, or it might be different. The Government might lose or might gain.

MR. JUSTICE BROWN: Then it is your position that this tax except on income as you have paid would not become payable until Alfred Vanderbilt reached the age of 35?

MR. TAYLOR: It would be payable as to the first half when he reached the age of 30 years, and as to the

other half when he reached the age of 35 years. Of course if he died sooner than that Reginald's interest in the income, which he would then receive, would be presently taxable, and when Reginald became thirty years of age he would get his one-half interest, and that would be taxable. In other words, the Government would always get its tax right along. It would get its tax at the same time that the beneficiary gets his legacy. Both will get the benefit together and there will be no chance about the matter. Each will be sure that he is getting a proportion of what the other is getting.

In the Federal statute your Honors will see at once the great difficulty of imposing the tax upon any person independent of the legacy which that person *receives*. You will see at once that there will arise questions as to whether that would not be a direct tax, and numerous other constitutional questions, which were never intended to be brought out by this act. This shows that the proper construction of the act is that for which I have contended, namely, that the tax shall be paid *out of* the property as it comes into the possession and the enjoyment of the person who is to receive it.

Section 30 of the act, to which I have already called your Honors' attention, emphasizes that to a very full degree. To go back to that just for a moment. It says: "That the tax or duty aforesaid shall be a lien and charge upon the property of every person who may die as aforesaid, for twenty years, or until the same shall, within that period, be fully paid to and discharged by the United States; and every executor, administrator, or trustee, *before payment and distribution to the legatees, or any parties entitled to beneficial interest therein*, shall pay to the collector or deputy collector of the district of which the deceased person was a resident, the amount of the duty or tax assessed upon such legacy or distributive share". That clause in the act emphasizes the statement which I have made. Taking the act as I have construed it, you have a harmonious

whole, and none of these difficulties which have been suggested can arise.

I notice that my friend on the other side, in his brief, calls attention to the fact that the act has been repealed, and he contends that it would be an unfair thing that an estate tied up in trust in this way should escape taxation whereas an estate in which no remainder has been created would be taxed. My answer to that is that there is nothing fair at all about these temporary inheritance acts. It is not a fair thing to tax Cornelius Vanderbilt, first and last, something over a million dollars which he has paid altogether, when another man, who did not happen to die at about the same time, does not pay anything at all. Whatever may be said as to the propriety of these acts, as enacted by State legislatures, and as enacted permanently, there is nothing much that can be said as to the fairness of the Federal Government enacting one of these statutes and having it in force for only four years, because whatever you do, you come down heavily on certain people, while other people, who are equally rich, are let go scot-free. I do not think, therefore, that any argument can be made upon the question as to whether or not the repeal of this act would cut out this last $300,000. We have already given the United States, apart from this, over $500,000; and I think we have paid our part of the expense of the War with Spain.

I come now to the position in which I *am* supported by the New York authorities, which is, that in instances where a man may not receive the money himself, where if he dies he has not the power to bequeath it to any one else, it is nothing but a gamble as to the principal, and, therefore, the taxation will be postponed until the interest comes into possession or enjoyment.

There is a difference between this position and the position which the Assistant Attorney-General takes. He makes the entire question depend upon our technical statute as to the difference between a vested and

contingent remainder. We have, in the State of New York, a little statute which I shall read to you presently, which has given rise, first and last, to over 400 decisions, many of them by the Court of Appeals, as to what is meant by a vested remainder and what is meant by a contingent remainder. Every time a question of a perpetuity comes up, every time some infant comes into the world inopportunely and wants a share of an estate, all the courts of the State of New York are set to work to construe what our statute as to vested and contingent remainders means, and they have been at it since 1830. The proposition of the other side is that each collecting officer shall go into all the niceties of distinction between what is a vested and what is a contingent remainder, and shall assess the tax, in case it is a vested, but not in case it is a contingent remainder. I do not think there is any such rule. The statute says that the beneficial interest shall be *clear*, and there is no other function to give to the word clear than to hold that when an interest in remainder is not clear, that is, is not certain, then it shall not be taxed until it is.

As the result of some 96 pages of argument, counsel on the other side, at the conclusion of his brief, says: "That a vested remainder has at least some 'clear' or 'actual' value, is unquestionable; otherwise it could not be made the subject of sale. Such sales are frequently made and sustained by the courts. The tax is based on the assumption that Alfred G. Vanderbilt will live to be 35 years of age, when the entire legacy will have been paid him. This assumption in turn is based upon standard mortuary tables. They show the average expectancy of life of men at 23 years of age to be 33.23 years. In other words, a man 23 years old has an average chance as demonstrated by the mortuary tables, of living to be 56.23 years of age. Nothing appears in this case tending to show the legatee is not in sound health, or that he is not subject to this average expectancy."

I submit that, upon their own statement, the chance

that Alfred Vanderbilt will live to be 35 years of age is nothing but a gamble. It may be a favorable gamble, but still it is nothing but a gamble, and that chance has not a dollar's worth of actual value in the ordinary market. He could not sell a dollar's worth of his residuary interest to anybody except someone who was willing to take chances. He could not go to a life insurance company, or to any other reputable company dealing in such matters, and, upon the statement that some lawyer had construed this to be a vested remainder, obtain a dollar on it. Why not? Because it is not sure. It is defeasible so far as he is concerned, and meanwhile if he died it is not disposable for his creditors or legatees or assignees.

The distinction which is drawn in the New York cases between estates which are vested and yet, being defeasible, are not subject to present taxation, is set forth at page 45 of my brief, and, if your Honors will permit me, I will read from it "In the Matter of Hoffman" in 143rd New York, because it is specially applicable to the present case. Judge FINCH, speaking for the court, said:

"By the will the mother took a life estate. If upon her death E survives, the latter will take a life estate, but if she dies before her mother E will take nothing, and have no estate to be taxed. In that event there will have been no actual transfer to her of any portion of the property of the decedent. She ought not to be taxed until events make it certain that there is an actual and beneficial transfer of the property to her."

* * * * * *

"We are obliged to follow one of two lines of construction. We must open all the nice and difficult questions which arise under a will as to the vesting of technical legal estates although future and contingent, and assess the tax upon what are in reality only possibilities and chances, and so complicate the statute with the endless brood of difficult questions which gather about the construction of wills; or we must construe it in view of its aim and purpose and the

object it seeks to accomplish, and so subordinate technical phrases to the facts of actual and practical ownership. For taxation is a hard fact, and should attach only to such ownership, and may properly be compelled to wait until chances and possibilities develop into the truth of an actual estate possessed, or to which there exists an absolute right of future possession. I am not shutting my eyes to the statutory language, which is quite broad. The property taxed may be an estate 'for a term of years or for life or determinable upon any future or contingent estate', or 'a remainder, reversion or other expectancy,' and the tables of mortality may be resorted to for the ascertainment of values. And yet, it is the 'fair market value,' the 'fair and clear market value' which is to be assessed, and with the proviso that if that value cannot be at once ascertained the appraisal is to be adjourned. I can scarcely imagine a contingency depending upon lives which mathematics could not solve by the doctrine of chances and the averages of mortality, and there could hardly be an adjournment unless upon some rare contingency having no averages, and the results in cases dependent upon lives might still leave the 'fair and clear market value' in doubt and yield sums which no sale in the market would produce."

The Court thereupon adjourned until tomorrow (Friday), October 14th, 1904, at 12 o'clock m.

WASHINGTON, D. C., October 14, 1904.

Argument of Howard Taylor, on behalf of the plaintiffs in error—(Continued).

MR. TAYLOR: May it please the Court, I was asked yesterday afternoon, once or twice, whether I claimed that there was a possibility of intestacy under the

residuary clause of this will, and whether, under that intestacy, it might happen that the estate would go to the widow who would not be obliged to pay any tax at all. I answered yes. But, may it please the Court, I do not want any of you to think, for a moment, that I hang my argument upon any such possibility. I do not. My argument will be the same and will lead to the same conclusion even though all possible legatees under this will should be in the same degree of relationship to the testator and would be obliged to pay the same rate of tax.

If your Honors consider the situation a moment, it becomes plain: Congress had the power to enact, in the first place, what we call a *probate* tax, that is to say, a tax upon the interest which the testator ceased to enjoy, in substance a tax upon his entire estate; and if that tax had been so enacted by Congress it would have been paid out of the entire estate. But Congress did not enact a tax of that kind. The case of *Knowlton* vs. *Moore* has decided that point. Congress, in the second place, had the power to enact a *legacy* tax, that is to say, a tax not upon the interest which the testator ceased to enjoy, but a tax upon the interest which the legatee is about to enjoy. That is a tax which puts the burden upon each particular legatee. Congress had the power, if it had chosen so to do, to enact both a probate tax and a legacy tax; but neither Congress nor any other human instrumentality had the power to mix these two taxes up, because they are essentially different in their nature. You cannot say that this is a probate tax because two legatees happen to be in the same degree of relationship to the testator, when otherwise it would be a legacy tax. You cannot say that this is a probate tax as to part of the estate which is tied up in trust, when it would be a legacy tax if there was no trust. And the taxing officer of the government cannot say that it is a probate tax in order to make immediate collection, when in other instances for the benefit of the government he considers it a legacy

tax, and when in truth in all instances that is the only way in which it can be considered. In other words, the two are essentially different things, and if this tax is, as Congress enacted it and as *Knowlton* vs. *Moore* has decided, a legacy tax, then *each* legatee bears his particular burden, and that burden is to be placed upon the *clear* interest that *he* owns under the will.

MR. JUSTICE HOLMES: I appreciate the main line of your argument; but when you come to talk about the power of Congress I think I do not quite follow you. Suppose Congress should say that if by will a testator should leave a life estate and then a remainder which may go to A, B, C, and persons unknown, that remainder should forthwith, without waiting to ascertain who is to enjoy it, have charged upon it a certain tax. Do you say Congress could not do that?

MR. TAYLOR: Yes, sir; I say that Congress could not do that unless Congress converted it in terms into a *probate* tax, because there is no *fund* out of which that can be immediately paid, until the remainderman comes into possession of it, unless it is a tax upon the whole estate. If the demand is immediate, then the payment of the money must either be a burden upon the life tenant, which of course is unjust, or else a burden upon the whole estate. It cannot be a burden upon the remainderman because he has not come into possession or enjoyment of it. You must take it out of the whole estate, and if you take it out of the whole estate it becomes a probate tax, which this is not.

I might as well say now, what I was about to say later on, that in the State of New York we have recently changed the whole theory of our inheritance tax in order to meet this one point. It was formerly a legacy tax, just as this Federal tax is, and the decisions were to the effect that where there was a remainder, either contingent or defeasible, then the tax upon the remainder or legatee could not be immediately collected. Our State Legislature did not like

the postponement of the payment of the tax, and accordingly entirely changed the provisions of our act. They changed it into what they call a "property" tax. I do not mean to say that it has lost the attributes of an inheritance tax, but it is now a tax upon the whole "property" of the testator. The provisions are to the effect that the taxing officer is to compute the highest rate at which that property could, by any chance, go to any possible contingent remainderman, and if it does not go to that remainderman then the State gives back the excess tax that has been paid. Your Honors will see upon what an entirely different theory that tax proceeds. We think it is a very improper tax. For instance, we have a tax of one per cent upon lineals and five per cent upon collaterals. We think that where there is a remote contingent remainder to a collateral it is very unfair to make the estate pay a five per cent tax and at some future time, when it appears that the remainder is to go to a lineal and not to a collateral, that it should be required to get the four per cent excess tax back from the State. This inequity is adverted to by the Court of Appeals in the *Matter of Brez*, 172 N. Y., 609, cited at page 51 of my brief. That, however, is the way in which they have changed the law in New York. The statute, as changed in New York, expressly provides that this shall be imposed upon the property of the testator, and our Surrogate courts are no longer taking the tax on life estates out of the income of the life tenant, but they are taking the entire tax out of the testator's estate as a whole. The legislature enacted that change in the tax with some little slovenliness. The question which was brought before the court in the Estate of Vanderbilt, in regard to the State tax was, whether, in point of fact, the legislature had done what they clearly intended to do. We argued before the State Courts that the Legislature had not accomplished its purpose, and the Surrogate and Appellate Division both held with us; but the Court of Appeals held, four to three, that the legislature had accomplished its purpose, that the whole theory of the

tax had been entirely changed, and that, therefore, the estate of Vanderbilt should as a whole at once pay that tax, which we did.

But so far as the Federal tax is concerned, it stands upon the decision which I read yesterday, which *was* the law of New York before this amendment to meet the very point which I here make. We stand upon that as showing that the tax in New York used to be a legacy tax, and being a legacy tax, under the New York decisions, Alfred Vanderbilt could not have been taxed at the present time.

When it is once firmly in mind that each legatee is to bear the burden of the tax, then it is no refinement to insist that Alfred Vanderbilt shall not bear the burden of the tax upon the principal of this estate, when, by reason of his death prior to reaching thirty years of age, he may never enjoy the principal, and when if he dies now he has no right to leave it to anybody. Just so long as it is kept in mind that it is the particular legatee who is to bear the burden of his tax your Honors will see the injustice of making that legatee bear that burden while his interest in that estate is contingent or defeasible.

The remarks which I have made show that the theory of Judge WHEELER, in taxing this property as a whole as it went *to* the trustees is illogical, under the Federal tax acts. The trustees are not the ones who bear the burden of the tax. It is each particular *beneficial* legatee who bears that burden.

The relation of the executors or trustees to the matter is well stated by Judge CULLEN in *Matter of Gihon*, 169 N. Y., at page 447. The estate is to "make the payment" prescribed "to *secure* such payment, because the government is unwilling to trust solely to the legatee."

I read yesterday the decision of the State Court in New York at page 45 of my brief. There is another case which your Honors will find cited at page 55 of my brief to the same effect in Illinois, from which I

will read two sentences (*People* vs. *McCormick*, 208 Ill., 437):

"The condition contemplated by our statute as that which should authorize the imposition of the tax is one of practical and actual ownership, the possession of a title to something that can be conveyed."

Alfred Vanderbilt could not convey his remainder interest, because if he dies before he is 30 years of age he will not have it, and he cannot, in the meanwhile, leave it to his legatees if he desires.

"If either of the children of the testator, in this case, should convey by deed, his or her interest in the remainder, and die before the expiration of the 20 years, the purchaser would take nothing, and under such circumstances to impose a tax upon either of the children of the testator on account of the right to succeed to the interest in the residuary estate, would be to tax the shadow and not the substance. It would result in taxing appellees upon the right to succeed to property when, so far as any beneficial ownership is concerned, there never was a right of succession. The right to succeed, under such circumstances is, for all practical purposes, a myth. Taxation to the tax payer is intensely real. It should not be levied upon that which is unreal. If the estates now under consideration are contingent they cannot be taxed until they are vested. If they are now vested they are subject to an estate for years, and subject to defeasance, and cannot be taxed until they become indefeasible."

May I now call the attention of Mr. Justice HOLMES to the case of *Howe* vs. *Howe*, 179 Massachusetts, at page 57 of my brief? The estate, in that particular case, was tied up by almost identically similar trusts to those now before the Court. While the discussion of the law is not so extended as it is in the Illinois and New York cases, the reasoning and conclusions are identically the same. The court said:

"In regard to the fund of $40,000, it [the Probate Court] ruled that any interest to which the two insti-

tutions may become entitled was exempt, but that any interest to which Gurdon S. Howe will become entitled if he attains the age of 45, or to which the heirs of his body or his widow may become entitled if he dies before arriving at that age, are subject to the tax, and that such tax shall be paid by the executor *when the time arrives*, and that the determination of the value of such future interest be postponed until the happening of said event.

" We think that these rulings were right."

I now desire to call attention to the cases in the Federal Courts under the statute of 1864. I have read the act of 1898 as it stood at the time Cornelius Vanderbilt died.

MR. JUSTICE PECKHAM: What was the date of his death?

MR. TAYLOR: He died in 1899 and the act was passed in 1898.

As pointed out in the case of *Knowlton* vs. *Moore*, that act is, barring the progressive rate features, substantially a repetition of the act of 1864, minus the amendments of 1866. In 1901 Congress made some changes in the act of 1898, apparently to codify the decision of the court in Knowlton vs. Moore. Among other changes it was provided, in express terms, that " any tax paid under the provisions of sections twenty-nine and thirty shall be deducted from the particular legacy or distributive share on account of which the same is charged." Congress also provided in the first part of the administrative section (30), that the tax or duty should " be due and payable *in* one year after the death of the testator."

The question of the effect of that clause came up before Judge LACOMBE recently. It was contended by the Government that the provision with reference to payment " in one year after the death of the testator " required the payment of the tax at all events *within* one year after the death of the testator. Judge LACOMBE did not regard that provision as so antagonistic to all the other provisions in the act. He held

that the construction which must be put upon that clause in the act was that the tax was *not* to be due and payable, in any event, *until* a year after the death of the testator, and he said that this case was precisely within the doctrine of *Mason* vs. *Sargent* (referred to in *Knowlton* vs. *Moore*), where it is decided, in regard to the Act of 1864, that no tax on remainders should be paid until after they came into actual possession.

MR. JUSTICE HOLMES: Where is the act you are now speaking about referred to in your brief?

MR. TAYLOR: It is referred to at page 44 of the brief of the Attorney-General. You will see there the amendment printed, and what the Attorney-General has to say in regard to it. I do not understand that he takes issue with us upon the particular point I am now making. The decision of Judge LACOMBE is a very recent one and is reported in 131 Federal Reporter, at page 651.

MR. JUSTICE HOLMES: Is that in your brief?

MR. TAYLOR: It is not, because at the time my brief was written it was not reported. It is the case of *Tilghman* vs. *Eidman*, in 131 Federal Reporter, page 651.

But apart from that, Cornelius Vanderbilt died in 1899. This act was passed in 1901, and therefore this clause, of which I speak, is only usable "arguendo" by either side. It has always been held that the statute which is in force governing any particular estate is the act which was in force at the time the testator died. In this instance he died before these amendments of 1901 were enacted.

In 1902 Congress again passed two acts. In the first place, it repealed the entire act, as a whole, saving, however, those taxes which had been imposed prior to the repeal. It also passed what was called the refunding act. That refunding act appears at page 59 of my brief. The clauses of that particular act also bear out the argument which I make; although I would call to the attention of the Court the

fact that this particular suit was begun by us prior to the passage either of the repealing or of the refunding act.

In 1902 this act was passed:

"That in all cases where an executor, administrator, or trustee shall have paid, or shall hereafter pay, any tax upon any legacy or distributive share of personal property under the provisions of the Act approved June thirteenth, eighteen hundred and ninety-eight * * * the Secretary of the Treasury be, and he is hereby authorized and directed to refund, out of any money in the Treasury not otherwise appropriated, upon proper application being made to the Commissioner of Internal Revenue, under such rules and regulations as may be prescribed, so much of said tax as may have been collected on contingent beneficial interests which shall not have become vested prior to July first, nineteen hundred and two. And no tax shall hereafter be assessed or imposed under said Act approved June thirteenth, eighteen hundred and ninety-eight, upon or in respect of any contingent beneficial interest which shall not become absolutely vested in possession or enjoyment prior to said July first, nineteen hundred and two."

I say—and here is where my friend differs from me—that upon the face of that act Congress *shows* what it intended by the use of the word "contingent." It did not intend a technical contingent remainder, but it intended the opposite of what was *vested in possession or enjoyment.* There are many "vested" estates if the term be used accurately which are not vested in possession or enjoyment. But in this particular instance Congress clearly intended to use the term "vested" as elliptical for "vested in possession and enjoyment," and so to use the word "contingent" as the alternative of an estate vested in possession or enjoyment. As it is conceded that the interest of Alfred Vanderbilt is not vested in possession or enjoyment, whether it be vested or not, we come right within the very terms of this refunding act.

An argument is made by the other side that so far as taxes have been already paid, the refunding act refers to a technical contingent interest, while so far as taxes have not been already paid, it refers to a contingent interest of the nature I have just described. I do not think this court will impose a penalty upon those who have suffered from the promptness of the Collector of Internal Revenue, while those in the same class who have not yet paid their tax would go free under the refunding act. The two situations were intended to be in the same category. In each contingent means the opposite to "vested in possession or enjoyment."

Therefore, either for the reason that there never was a tax imposed upon future estates while defeasible, or upon the argument that we are under the terms of the refunding act, the same conclusion is reached even though Alfred Vanderbilt's is technically a vested remainder.

Finally, I should not travel over the ground in this case thoroughly unless I argued, as I do, and as I believe, that even under our technical New York rule the interest of Alfred Vanderbilt is a contingent interest. As I said yesterday, that New York rule has given rise to several hundred law suits. When I read the rule your Honors will perhaps not wonder at it :

"A future estate is either vested or contingent. It is vested, when there is a person in being, who would have an immediate right to the possession of the property, on the determination of all the intermediate or precedent estates. It is contingent while the person to whom or the event on which it is limited to take effect remains uncertain."

§ 30 Real Property Law, Chap. 347, L. 1896.

I say that this estate is, technically, a contingent estate, because the person to whom it is limited to take effect and the event upon which it is limited to take effect are both uncertain. One cannot tell

whether this estate will go to Alfred Vanderbilt or to his children, or to Reginald Vanderbilt, because that depends upon whether he reaches 30 or has any children and whether they reach their majority, and if Reginald Vanderbilt dies then we cannot tell but that it will go further on. So it is contingent. It is also not vested. "The person" referred to in the statute is some particular person, the same now and later. There is now no such particular person who would have "the immediate right to the possession of the property," no matter when the life estate determined. Alfred Vanderbilt will have the right to it if it determines after he is thirty years of age, and somebody else will have the right to it if it determines before he is thirty years of age. Therefore, upon the concession of the learned Assistant Attorney-General, we are not subject to this tax; for the interest is a technical contingent remainder, I say, even within the phraseology of the New York rule.

I have cited two cases on my brief, to which I particularly here call attention, the Waddell case, and Smith against Edwards. (pp. 67 and 68)

But I do not believe that Congress ever thought about any such technicalities. Congress intended a harmonious whole. It intended a legacy tax, and it intended to tax the legatee out of what he received, and when he received it. That was fair to all parties, and it would remain a benefit to the United States if Congress had not repealed the act. The very repeal of the act must give rise to some unfairness, however you choose to put it, because some testators are, under the short duration of the act taxed as heavily as we have been, while other testators, equally rich, will go free. If we now somewhat escape by the application of the proper theory of a legacy tax it is not unfair to the Government but rather diminishes the unfairness already put upon us.

Argument in Reply of Howard Taylor, of Counsel for the plaintiffs in Error.

MR. TAYLOR: If it please your Honors, in view of the questions of Mr. Justice HOLMES to Mr. Robb, I feel that in spite of what I have said, he is still possibly interested in the question of whether this is technically a future contingent interest or whether it is a present equitable fee; and while I still insist that so far as this particular tax is concerned it is not practicable to determine the questions upon such abstruse considerations, we have in our brief the New York rules upon that subject, and I call your Honors' attention, without reading it, to page 66, under subdivision 3.

In the case of *Vawdry* vs. *Geddes*, an old English Chancery case, the principle was laid down, applying certainly to instances of personalty, that where there is a present income, and where there is a future interest in the fee, but there is also a limitation to certain other particular people in the will in case of a death prior to the time when the recipient should attain the fee, then there is no present equitable fee, but there is a future and a contingent interest—an executory limitation often referred to as a remainder. The rule in that case has been cited in *Smith* vs. *Edwards*, 88 N. Y., which is at page 67 of the brief, and has also been followed later in the case of *Greenland* vs. *Waddell*, 116 N. Y., cited at page 68 of the brief; and upon those cases I am quite willing to rest my contention that technically, under the New York State rule, we are in this instance presented with a contingent remainder.

MR. JUSTICE PECKHAM: Is it your view that the New York rule has anything to do with the question as to the construction of the Federal statute?

MR. TAYLOR: It does not seem to me that it can have, but that is the position to which my friend on the other side is relegated, when he undertakes to say

that this taxation matter is to be determined by whether this is technically a contingent interest as distinct from technically a vested interest, because that question must be determined by the rules relating to property, real and personal, in the State where the estate is situated. I say that is a reason why we should *discard all these technical* rules relating to contingent estates and vested estates, and should come down to the solitary question of whether or not a man is paying a tax on something which he may never enjoy. That is my contention; but if I am wrong in that contention, and if I am relegated to this matter of contingent and vested estates, then I am willing to discuss it; but of course in that event you must discuss it on the basis of the New York rule.

I call attention again to the fact that we are dealing with personalty, and that many of the cases, in fact most of the cases, which are cited in the opposing brief as showing that this estate is technically a vested, present estate, are cases relating to real estate. We have the distinction in New York in regard to realty and personalty in that respect.

The observations of Judge HAIGHT in the Vanderbilt case in New York were purely passing observations, purely dicta; and yet we have dwelt with care upon the cases which he cited, and have shown that none of those cases sustain the proposition that this was a vested estate (pp. 70–74 of our brief).

Coming back to the matter which was adverted to by his Honor Justice WHITE, those regulations of the internal revenue bureau under the original act of 1864 included a ruling that a tax should be collected on all kinds of future estates, whether they were vested or whether they were contingent. Paragraph 17 provides:

"When a legacy is made payable on a future contingency, the value of the legacy is to be estimated by a consideration of the time", &c.

The case of *Clapp* vs. *Mason*, to which his Honor has alluded, decided that in theory that was not right.

At the same time, Congress by the amendment of 1866, enacted that it was not right; and when it came up later, in the *Sargent* case, the Supreme Court relied more particularly upon the amendment of 1866. But when the act of 1898 was passed, the Internal Revenue Commissioner did not fall into the same error *that he had in construing* the first act of 1864. As shown in the schedule in this case of *Knowlton* vs. *Moore*, he began to tax only on the income which was vested. The amount taxable upon the remainders were there left vacant. Therefore there was no occasion, by any act of amendment to the act of 1898, to do the same thing which was done in regard to the act of 1864.

But for all these things we should scarcely impute logical intentions to Congress. In regard to this refunding act, for instance, the argument might be made that the refunding act showed the necessity for a special act to release contingent remainders from the tax. The answer to that argument is the history of how it came to be passed. There was a distinguished lawyer from Providence who was interested in the estate of John Nicholas Brown, and who had drawn the will for John Nicholas Brown which provided in terms that young Brown should not have an estate that was absolutely vested until he was 25. Then having those words in the will, he suggested to the Congressional Committee having the refunding act in charge that the words "absolutely vested" be incorporated in the Act, which was done. The Act was passed accordingly, which provided freedom in terms for his particular estate, in the very words of the will. The humor of the situation is that Judge PLATT held that the words in the will did not mean what they said, and that the estate was taxable (128 Fed. Rep., 310). It is one of the decisions which has followed Judge WHEELER'S.

And so as to the suggestion of the Assistant-Attorney-General that the amendment of 1866 was passed because the emergency that led to the passage of the

act of 1864 had ceased and consequently there was no longer any necessity for such immediate collection of the tax upon all future interests. Your Honors scarcely need be reminded, that never in its history was the government in greater need of immediate revenue than it was at the very time this amendment of 1866 was enacted.

There is no accurate reasoning that can be deduced from these changes in the statutes. I can find as much in my favor in those amendments and in the repealing statute as can the other side. I could say that if the Attorney-General finds specific comfort in the amendments of 1901, their absence in the act of 1898, which is the statute here applying, is an additional argument for my side. But all that is loose reasoning. When your Honors come down to the final question you will see that it depends upon what Congress said in the original act of 1898, which was the act that applied to Cornelius Vanderbilt's estate, he dying in 1899, and upon what are the necessary deductions from that enactment.

I am obliged to your Honors for your attention.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 206.

WILLIAM K. VANDERBILT ET AL., PLAINTIFFS–APPELLANTS,

vs.

FERDINAND EIDMAN, AS UNITED STATES COLLECTOR, ETC., DEFENDANT–RESPONDENT.

Supplemental Citation to Be Added to Brief of Plaintiffs-Appellants.

Since this case was argued the New York Court of Appeals has handed down a decision in the *Matter of Tracy*, 179 N.Y., 501, appearing in the advance sheets of the Northeastern Reporter, published December 30, 1904, Vol. 72, No. 5, page 519, to which the attention of this court is respectfully called.

This decision has an important bearing upon two features of the argument in our case:

(1.) The Court of Appeals there holds that its decision in the *Matter of Vanderbilt*, 172 N. Y., 69, regarded the interest with respect to which a transfer tax was there imposed as a *contingent interest*. This is the unanimous opinion of the court in that case.

This is the same interest with respect to which the tax in this case was imposed, and this decision of the Court of

Appeals therefore sustains the contention in our brief, that under the laws of the State of New York such interest is contingent and not vested.

The opinion on this point is as follows (179 N. Y., p. 509):

"In *Matter of Vanderbilt* (172 N. Y., 69) this court construed section 230 of the Transfer Tax Law as affecting the payment of the tax upon *contingent remainders*, and held that the tax was payable forthwith out of the property transferred.

* * * * * * *

"As our decision in *Matter of Vanderbilt* dealt only with a *contingent remainder*, this case, technically speaking, is not strictly in point, but the principle announced therein is necessarily involved in life estates created by trusts."

(2.) The Court of Appeals also holds in *Matter of Tracy* (*supra*) that in New York this transfer tax is no longer a legacy tax, or tax on the interest which the beneficiaries receive, as formerly, but has been changed to a probate tax, or tax upon the whole bulk of the estate as it passes from the decedent, and the several interests in such property are valued only by way of computing the taxable value of the property itself.

This is exactly what is contended in our brief in drawing the distinction between the Federal inheritance tax and the New York transfer tax, as construed in the *Matter of Vanderbilt* (*supra*).

The opinion of the court, so far as it deals with this question, is as follows:

"BARTLETT, *J.*:

"The executors and trustees under the last will and testament of George N. Kennedy, deceased, attack the decree of the surrogate's court of Onondago county, entered upon the judicial settlement of their accounts, in three particulars, to wit:

"(1.) Wherein it adjudges that the taxes on life estates, created by the will, assessed under the State transfer tax law and the United States war revenue tax law, should be de-

ducted from the income and rents, to which each of said life tenants were respectively entitled, before any part of the same should be paid to them."

* * * * * * *

"The will is lengthy, containing numerous provisions, but its general scheme can be briefly stated. The entire property, real and personal, after the payment of debts and legacies, is converted into trust estates for the benefit of life tenants and remaindermen, all of the latter being contingent, depending upon the status at the death of the life tenant, except the defendant, The Syracuse University, which takes its estate in remainder upon the death of Elizabeth K. Freeman, a daughter of the testator."

* * * * * * *

"The testator died September 7th, 1901, and consequently the State transfer tax law as it existed after the amendments of 1899 and 1900 is applicable to this case. These amendments are sought to supply what were deemed omissions in the transfer tax law as it then stood, as some of the courts had decided that the transfer tax on life estates was payable out of income and no tax could be imposed on contingent remainders. (*Matter of Johnson*, 6 Demarest, 146; *Matter of Roosevelt*, 143 N. Y., 120.)"

It should be noted here that in the *Matter of Vanderbilt* (*supra*) the court anticipated the amendments above referred to, in construing the existing law to mean that the tax was payable out of the bulk of the estate immediately upon the death of the decedent, regardless of the character of the various interests passing to the beneficiaries.

"The present appeal is controlled by the transfer tax law (Laws of 1896, chapter 908, § 230), as amended by chapter 76 of the Laws of 1899 and chapter 658 of the Laws of 1900. The material portions of section 230 read as follows: 'Whenever a transfer of property is made, upon which there is, or in any contingency there may be, a tax imposed, such property shall be appraised at its clear market value immediately upon such transfer, or as soon thereafter as practicable. The value of every future or limited estate, income, interest or annuity dependent upon any life or lives in being, shall be

determined by the rule, method and standard of mortality and value employed by the superintendent of insurance in ascertaining the value of policies of life insurance and annuities for the determination of liabilities of life insurance companies, except that the rate of interest for making such computation shall be five per centum per annum. * * * When property is transferred in trust or otherwise, and the rights, interests or estates of the transferees are dependent upon contingencies or conditions whereby they may be wholly or in part created, defeated, extended or abridged, a tax shall be imposed upon said transfer at the highest rate which, on the happenings of any of the said contingencies or conditions, would be possible under the provisions of this article, and such tax so imposed shall be due and payable forthwith by the executors or trustees *out of the property transferred.*'

"It thus appears that whenever a transfer of property is made, upon which there is, or by any contingency there may be, a tax imposed, the property is to be properly appraised at its clear market value and the transfer tax is due and payable forthwith *out of the property transferred.*

"In *Matter of Vanderbilt* (172 N. Y., 69) this court construed section 230 of the transfer tax law, as affecting the payment of the tax upon contingent remainders, and held that the tax was payable forthwith out of the property transferred. Judge Haight, writing for the court, said: 'It seems to me clear, that the legislature by this amendment intended to change the law upon the subject and to make the transfer tax upon the property transferred in trust payable forthwith. The tax is not required to be paid by the conditional transferee, for, by the provision of the statute, it is "to be paid out of the property transferred." So that whoever may ultimately take the property takes that which remains after the payment of the tax.'

"As our decision in *Matter of Vanderbilt* (*supra*) dealt only with a contingent remainder, this case, technically speaking, is not strictly in point, but the principle announced therein is necessarily involved in life estates created by trusts.

"In the case at bar it is the duty of the executors and trustees to ascertain the value of the respective life estates and estates in remainder in the manner pointed out by section 230; and having done this, they should compute the transfer tax and pay the same forthwith out of the property

transferred. The result is that the life tenant loses, during the continuance of his estate, the interest upon the *corpus* of the trust so paid out, and eventually the remainderman receives his estate diminished by the amount of said payment.

"Whether this mode of taxation works out exact justice as between the life tenant and the remainderman is a question with which the court is not concerned.

"As we read the statute, the legislative intention is clear that the transfer tax shall be paid out of the *corpus* of the trust estates, and not out of the income.

"It, therefore, follows that the transfer taxes imposed upon the estates for life and in remainder, created by the eighty-thousand-dollar trust, under which testator's daughter, Jessie B., is the life tenant, are payable out of the principal of that trust.

"Also that the transfer taxes imposed upon the estates for life and in remainder, in the various trusts carved out of the residuary estate, are payable from the principal of said trusts respectively."

Respectfully submitted.

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JANUARY 3, 1905.